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Hearing

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 CHEVRON CORPORATION,

4 Plaintiff,

5 v.

11 CV 691 (LAK)

6 STEVEN DONZIGER, ET AL.,

7 Defendants.

8 -----x

New York, N.Y.
December 20, 2012
11:00 a.m.

9
10 Before:

11 HON. LEWIS A. KAPLAN,

12 District Judge

13 APPEARANCES

14 GIBSON DUNN & CRUTCHER

15 Attorneys for Plaintiff Chevron

16 BY: RANDY M. MASTRO

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Attorneys for Defendant Donziger

22 BY: MATTHEW WERDEGAR

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1 (Case called)

2 MR. MASTRO: Ready, your Honor.

3 THE COURT: Good morning.

4 MR. VESELKA: Yes, your Honor, ready.

5 THE COURT: Good morning.

6 MR. WERDEGAR: Good morning, your Honor.

7 Matthew Werdegarr, on behalf of Donziger defendant.

8 THE COURT: Good morning.

9 OK. Now, obviously, we're going to take up the
10 Chevron motion to compel or what is left of it first because it
11 was first in time and, obviously, as the joint submission
12 reflects. You folks have made a certain amount of progress on
13 narrowing the issues for which I can assure you I am grateful.
14 Let me just get my papers organized.

15 OK. Now, as a preliminary matter I assume that there
16 is somewhere what is probably a pretty elaborate writing
17 indicating all the points on which you've agreed by indications
18 you've made two requests that have been withdrawn and so forth.
19 Is that correct?

20 MR. MASTRO: Your Honor, we would be able to provide
21 that, yes, absolutely, your Honor.

22 THE COURT: Well, there's going to be an order at the
23 end of the day and I need to have it for the order.

24 MR. MASTRO: Certainly, your Honor. We have been
25 compiling such a list and we did make substantial progress as

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1 your Honor noted, so we're happy to provide that to the Court.

2 THE COURT: OK. All right. Then, we'll begin with
3 the joint report concerning Chevron's motion to compel which I
4 think is Item Number 608 on the docket and it outlines a number
5 of what I guess are more or less points of principle on which
6 you are in dispute and then lists particular requests as to
7 which those five principled points relate.

8 The first one that I understand to be on the table is
9 that the plaintiff Chevron seeks production pursuant to this
10 request through July 10, 2012. Am I correct in understanding
11 that that is with respect to specific enumerated requests and
12 not generally, is that right?

13 MR. MASTRO: That is correct, your Honor. We've
14 substantially narrowed the field of requests to, specifically,
15 the ones in Exhibit A.

16 THE COURT: OK. And the position of the defendants
17 represented here today is that the cut-off should be February
18 14, 2011, the date of the -- date I think of the amended
19 complaint, is that right?

20 MR. WERDEGAR: Your Honor, first I just want to -- the
21 Court mentioned Document 608. I just want to make sure that
22 the Court is aware that on the 12th of December the parties
23 filed and updated joint report which is Document 663 which
24 reflects the parties' agreements and compromises through that
25 date.

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1 THE COURT: I may have misspoken in saying "608".

2 MR. WERDEGAR: 608 was the motion.

3 THE COURT: So it's document 667?

4 MR. WERDEGAR: 663, your Honor.

5 THE COURT: Let me just make, absolutely, certain that
6 the one I am looking at which doesn't have the number on it is,
7 in fact, the same one that's Document 663.

8 (Pause)

9 MR. WERDEGAR: One way to tell, your Honor, is the 663
10 the updated one should not have an Exhibit 3 because the
11 Exhibit C would resolve --

12 THE COURT: Okay. Well, my law clerk has one with a
13 number on it and that's right. That's what I am looking at.

14 OK. Well, now I've read your submissions with respect
15 to the general proposition and if somebody wants to add
16 anything briefly with respect to the question of July 10, 2012
17 versus February 14, 2011 I'll, certainly, hear anything you
18 wanted to within reason. So anybody want to address it?

19 MR. MASTRO: Yes, your Honor, very briefly.

20 Your Honor, the defendants' position is predicated on
21 misrepresentation of the gravamen of the action. They say that
22 the cut-off should be February 14, 2011 cause that's the date
23 of the judgment and they mischaracterize the action, the
24 gravamen of the action as being a complaint about obtaining a
25 fraudulent judgment in Ecuador, judgment having been issued on

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1 February 14, 2011.

2 Your Honor yesterday in your opinion accurately
3 described the core of this case which is a claim that Steven
4 Donziger, a New York lawyer and others, conceived substantially
5 executed largely funded and significantly directed the scheme
6 to extort and defraud Chevron, a U.S. company, by among other
7 things, one, bringing a lawsuit, fabricating --

8 THE COURT: Mr. Mastro, slow down. Bear in mind that
9 since I wrote it as recently as yesterday I have it pretty
10 freshly in mind.

11 MR. MASTRO: So, your Honor, the fact of the matter is
12 the categories that we have defined where production should
13 occur the date more recent than February 14, 2011 it is in
14 every instance going to the sort of core allegations about the
15 larger extortion scheme originating from the U.S. Your Honor,
16 we have agreed to provide discovery to the other side in 50
17 separate requests that go beyond February 14, 2011, when it
18 suited their purpose Bohan Nunez which they love to bring up
19 all the time they've agreed that there should be production
20 post February 14, 2011. So --

21 THE COURT: I think I've got your position.

22 MR. MASTRO: Thank you very much, your Honor.

23 THE COURT: Anybody else? Mr. Werdegarr.

24 MR. WERDEGAR: Yes, your Honor.

25 Our position is a little more nuanced than a blanket

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1 cut-off of February 14, 2011. We've offered to produce
2 documents up through the point that there are any allegations
3 with any specificity about misconduct on the part of
4 Mr. Donziger or the Ecuadorian plaintiffs. So, for example,
5 with respect to the appellate process and post judgment events
6 there's one paragraph in the amended complaint that addresses
7 at Paragraph 327 regarding the selection and composition of the
8 intermediate appellate panel in Ecuador and we've offered to
9 agree to produce documents up through the time that that panel
10 was selected.

11 We've also by way of compromise offered to produce
12 documents regarding the criminal charges in the criminal case
13 in Ecuador through June of 2011 when that case concluded and
14 that was full-time range of day to request it.

15 Our position, your Honor, is that anything beyond what
16 they've alleged is really, it's speculative, it's a fishing
17 expedition. They're just seeking in a very broad strokes, very
18 broad requests more fuel for their fire. But they had an
19 opportunity to amend their complaint, to add any allegations
20 they thought they had of fraudulent or other kinds of
21 misconduct through up to I believe August of this year and they
22 even requested an extension of time from the Court which the
23 Court granted to do that to supplement their complaint but they
24 consciously chose not to.

25 And so now beyond Paragraph 327 the misconduct they're

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1 claiming is not anywhere in their complaint, nothing is pled
2 with any specificity. And we believe that they shouldn't be
3 entitled to take a broad range of ongoing discovery about
4 conduct and events that appears no where in their pleadings,
5 particularly, when they chose not to update their pleadings,
6 your Honor.

7 THE COURT: OK.

8 MR. VESELKA: Your Honor, apologize.

9 THE COURT: No. I am sorry. I thought that was
10 Mr. Matro. Go right ahead.

11 MR. VESELKA: For efficiency sake, our positions are
12 identical. We'll try not to repeat. So with, particularly,
13 with regard to the Exhibit A issues we're substantially
14 identified with the defenses raised by Mr. Werdegard.

15 THE COURT: OK. Fine. I reject categorically the
16 idea that there ought to be a February 14, 2011 cut-off. And I
17 reject categorically that there ought to be a cut-off at that
18 date except as to matters alleged with specificity in the
19 complaint.

20 I'll resist the temptation to dictate the Law Review
21 article one could write as to all the reasons that is so. But
22 I do find helpful Robco Distributors versus General Glass 101
23 Federal Rules decision 547 and Southwest Hide Company versus
24 Goldston 127 Federal Rules decisions 481.

25 In addition, I would point out a couple of other

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1 things. The approach that I am invited by the defendants to
2 take would go even beyond being a throwback to the era of code
3 pleading that antedated, not just the Federal Rules of Civil
4 Procedure but the field code adopted in New York and the Equity
5 Rules of the Supreme Court just adopted, if memory serves, in
6 1912, it was entirely clear well over 100 years ago, for
7 example, that in a patent infringement case a plaintiff could
8 prove at trial evidence of an infringement by a device that was
9 a modification of the accused device that did not even exist
10 when the suit was brought. There are so many common sense
11 reasons why the defendant's position is wrong that it's
12 mind-boggling.

13 Take, for example, the case in which someone is
14 indicted. Two people are indicted for committing murder on
15 January 1, 2010. The indictment is the practical equivalent
16 and it is the equivalent in a criminal case of a complaint.
17 And suppose while the case is awaiting trial Defendant Number
18 One decides to cooperate against Defendant Number Two. And
19 Defendant Number Two puts out a contract to kill Number One. I
20 would venture to say there is not a lawyer in this room who
21 would have the slightest doubt that the government would be
22 able to prove on the original indictment the fact that the
23 remaining defendant sought to have his co-defendant who had
24 turned against him, killed for the purpose of establishing
25 consciousness of guilt without any change in the indictment.

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1 Take it out of the criminal context and let's put it
2 all in a civil context. And imagine we have not a criminal
3 indictment but we have a complaint on behalf of the estate of
4 the dead person for wrongful death for exactly the same reasons
5 I have no doubt in the trial of wrongful death action the
6 contract put out on the co-defendant would be admissible and I
7 have no doubt that discovery could be conducted by the
8 plaintiff against the remaining defendant on the issue of
9 whether he tried to have a witness against him killed to prove
10 consciousness of guilt.

11 We then get to the fact that under Rule 404(b) we have
12 extremely broad admissibility of evidence, and mind you, we're
13 not talking about admissibility of evidence. We're talking
14 about discovery which is still broader for a vast variety of
15 purposes among them in this circuit being proving up the
16 relationships among conspirators, proving up the carrying out
17 of a conspiracy which was at an earlier point in time at the
18 time of the complaint or indictment and a vast number of other
19 purposes.

20 Discovery of those matters in an appropriate case,
21 subject to all the other mechanisms available to a trial judge
22 to manage discovery, is relevant. It's appropriate. And all
23 of that is without regard to the fact that this is a complaint
24 which, everybody understands, charges a continuing conspiracy
25 and course of conduct which is alleged to be going on today and

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1 is alleged to be likely to continue tomorrow and for the
2 indefinite future and in my view at an absolute minimum. And
3 the plaintiffs as a matter of relevance are, certainly,
4 entitled to discovery with respect to all of those matters for
5 appropriate purposes. And that's possibly a different question
6 from exactly how much I am likely to give them because these
7 are discretionary calls for all kinds of reasons.

8 Which brings me to the final preliminary thought that
9 I wanted to offer and I will not be so windy as we go along and
10 it is this. A good deal of the argumentation that's in the
11 joint report, certainly, from the defendants and I think on
12 some occasions from the plaintiff is to the effect that in
13 ruling on objections to the subpoena served on Patton Boggs I
14 had decided certain matters which, of course, I did but the
15 parties take it one step further and suggest that I decided
16 relevance issues necessarily in each and every case.

17 And so, for example, if I said that a specification
18 seeking documents from Patton Boggs on Proposition X was not
19 going to be allowed, the defense argued that ship has now
20 sailed and you, certainly, can't let the plaintiffs have
21 discovery on that subject against the parties for litigation.
22 That's simply wrong. And I made it very clear at the beginning
23 of the proceedings on September 25th that that was wrong.

24 I set out a preliminary statement that is set forth in
25 the transcript on September 25th starting at page 3 and

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1 continuing through page 8 about just how I was approaching the
2 Patton Boggs subpoena which involves considerations that go
3 well beyond matters of pure relevance and that in most
4 respects, and probably all respects, are not pertinent here and
5 the one that I want to draw your particular attention to is
6 this and it's on page six of that transcript and I said the
7 following:

8 It ought to be plainly understood that I am
9 approaching this first and foremost with Rule 26(B)(2)(c) in
10 mind. That gives district courts discretion to limit the
11 extent of discovery even of relevant matters for several
12 reasons. One of them is that its burden or expense outweighs I
13 its likely benefit considering the needs of the case, the
14 amount in controversy, the parties' resources, importance of
15 the issues at stake and the importance of the discovery in
16 resolving the issues. Unless I otherwise indicate the ruling
17 rulings that I make should be understood as practical judgments
18 about the appropriate scope of the subpoena in light of these
19 considerations in the present posture of the case rather than
20 rulings as to relevance as a purely legal matter of the
21 material sought.

22 And, certainly, among the concerns and considerations
23 I brought to bear in making the rulings of the Patton Boggs
24 subpoena was a sensitivity to the fact that Patton Boggs is a
25 law firm and that is I have written before in this or its

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1 related case, the Donziger 1782 matter. I am sensitive to the
2 concerns about subpoenas addressed to lawyers and that has been
3 true with respect to the subpoenaed to Patton Boggs and will
4 continue to be true without forecasting a result. And my
5 endeavor there was to try to cut that subpoena and the scope of
6 the material as to which we're going to wind up litigating
7 crime fraud as to which they may or may not persist questions
8 as to burden to the absolute minimum. And the materials that
9 have been submitted so far show, although I can't quote all the
10 statistics, that that endeavor has been enormously successful
11 because the latest submission by Patton Boggs with respect to
12 the issue of burden demonstrates that the scope of the search
13 and the documents they expect might be generated is, if I
14 remember it accurately and I'll stand to be corrected if it
15 needs to be, a small fraction of what they were talking about
16 then that means was first served. So everybody needs to
17 understand that and I think it'll save us a lot of time going
18 forward to have that before us.

19 Now given the ruling I made with respect to the time
20 period, we can now begin going through Exhibit A to see whether
21 any of the remaining requests as to which there are disputes
22 remain in dispute given the overall ruling and what, if
23 anything, ought to be done about it.

24 Now is there some convenient way of grouping these
25 that you want to recommend to me? Because the list is 35 pages

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1 long in small print.

2 MR. MASTRO: Your Honor, I can suggest some categories
3 and the specific RFPs that fall into those categories and maybe
4 would help us and if the defendants are still objecting then
5 that would still be something that would require a ruling but I
6 can give the category and the requests that are in that
7 category and we can take it from there.

8 THE COURT: OK.

9 MR. MASTRO: First category would be Agency Theory and
10 Authority to Act and Donziger's communications with the lapse
11 themselves. So this is in the category of authorization to
12 represent agency who is acting on their behalf, who is going to
13 act on their behalf and Donziger's communications with them.
14 That would be Request Number One, 11, 12, 13, 14, and 24 of the
15 Donziger RFPs and there are corresponding one to the lapse.
16 We'll know the exact numbers.

17 THE COURT: That's Category Number One. Category
18 Number, two.

19 MR. MASTRO: Would be a category I would describe as
20 money flow, funding allocation of money and money laundering
21 and that would be Donziger RFP requests 25, 26, 28, 29, 30, 33,
22 35, 115, 116, 117 and 118. And that would include the money
23 flow payoffs to certain people including Cabrera and how funds
24 were allocated.

25 Third category would be exclusive activity,

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1 ghostwriting and Cabrera's lack of independence in that
2 context. So that would be collusion with the ROE, the
3 judiciary and court appointed experts, Cabrera, ghostwriting of
4 reports and court opinions and then the lack of Cabrera's
5 independence. That would be Donziger requests 98, 99, 105,
6 106, 108, 110, 119, 120, 121, 122, 123, and 125 and, of course,
7 our allegations are that there's continue to be allusive
8 activity and influence into the appellate process and a
9 cover-up that has occurred since.

10 Now, Category Four would be in the area of enforcement
11 as well as it's origins of Invictus that would be Donziger
12 Request Number 31, 32 and 119.

13 And final category I would describe, your Honor, as
14 obstruction, false representations to U.S. courts, witness
15 tampering or intimidation. And that would be Donziger Request
16 23, 83 and 86 and 87. I think those would be six general
17 categories, your Honor.

18 THE COURT: I counted five.

19 MR. MASTRO: Your Honor, my math is off by one.
20 Excuse me. I just came in on a redeye. Sorry.

21 THE COURT: It's OK. And I take it that this
22 left-hand column in Exhibit A which indicates the request
23 numbers for both Mr. Donziger and the lapse --

24 MR. MASTRO: It does, your Honor.

25 THE COURT: -- is the cross reference points. So we

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1 can just -- unless there's one that there's a request to
2 Donziger and no corresponding request the other way or vice
3 versa, we can just speak in terms of Donziger?

4 MR. MASTRO: Correct, your Honor. There should be a
5 cross reference for each --

6 THE COURT: You agree?

7 MR. VESELKA: Yes, your Honor. I was going to make
8 sure the Court saw that both of those were listed.

9 THE COURT: I appreciate that.

10 OK. Well, just in the hope of getting off to a
11 manageable and, perhaps, successful start and getting everybody
12 feeling that this is actually doable, let's start with the
13 Fourth Category which counsel described as enforcement and
14 Invictus which are Donziger Requests 31, 32 and 119.

15 All right. Number 31, all documents related to Andres
16 Snader. I realize we addressed this in the Patton Boggs days
17 but forgive me for not remembering every name in the case, so I
18 have no idea who he is as I sit here this morning. What's the
19 story with this fellow?

20 MR. MASTRO: He is a consultant to the Lapse with the
21 firm called Nextent and they have been consulting on
22 enforcement activity around the world, your Honor. He is a
23 person again, had a law degree but he is not functioning as a
24 lawyer in this capacity. He is functioning as a consultant and
25 that's why we requested that he has been advising them on

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1 enforcement issues.

2 THE COURT: So that picks up Number 32 as well which
3 is Nextent, right?

4 MR. MASTRO: Yes, your Honor.

5 THE COURT: And then let me just look at -- OK. Let's
6 talk about those two, 31 and 32. I understand the plaintiff's
7 position. What's defendants' position apart from the Patton
8 Boggs argument?

9 MR. WERDEGAR: Your Honor, I think our position would
10 be the same as articulated by Patton Boggs during the Patton
11 Boggs subpoena hearing your identical requests. We don't
12 believe that Chevron should be entitled to use this proceeding
13 to obtain discovery about other international proceedings that
14 are ongoing related to the enforcement of the Ecuadorian
15 judgment. Those proceedings are going on. Chevron has
16 whatever rights it has, whatever discovery options it has with
17 respect to the enforcement internationally and I am sure it'll
18 exercise those to its fullest. It shouldn't be permitted to
19 use this proceeding as a way of gaining a strategic advantage
20 with respect to those separate international ongoing
21 proceedings. And I think that that's consistent with the
22 Second Circuit's holding with respect to the Count Nine action,
23 your Honor.

24 THE COURT: Well, the Second Circuit's holding is
25 rather more limited than the defense seems to think it is but

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1 go ahead, sir.

2 MR. VESELKA: Want to give all arguments so you can
3 address them all at once.

4 THE COURT: Absolutely.

5 MR. VESELKA: I think also at this stage of the
6 proceeding trying to get the case ready for trial that be --
7 going into the enforcement actions and dealing with all what
8 potential privilege issues would be raised with regard to
9 enforcement would be a burden on all the parties that would be
10 interfered. So we think opening up discovery on ongoing or
11 prospective enforcement actions would not help in getting the
12 case prepared for trial as to the liability -- what has gone on
13 and what's addressed in the action.

14 THE COURT: Mr. Mastro, here is my concern about this.
15 Those two requests are as broad as all outdoors. Now, putting
16 aside the question of technical relevance cause I think it's
17 technically relevant. To the extent these requests are likely
18 to turn up material, I suppose one of the things they're likely
19 to turn up is material with respect to plans about what to do
20 next and where, right?

21 MR. MASTRO: That's true, your Honor. I would like to
22 be in that category.

23 THE COURT: Now, it also may turn up stuff as to
24 what's been done already and why but let's put that to one side
25 for a moment. Now, to the extent it turns up material about

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1 what do next and where it's almost, certainly, going to be met
2 with a claim that this is material prepared in anticipation of
3 litigation which, initially, seems to me probably right and in
4 some cases at least it's likely to be what I'll loosely call
5 opinion work product.

6 Now, as to any opinion work product, putting aside
7 crime fraud for the moment, seems to me the plaintiff is not
8 likely ever to get it anyway. As to non opinion work product,
9 I suppose it's pretty speculative to think that you'd wind up
10 getting it. And so as to so much of these requests as the
11 future oriented, seems it's got to generate a whole lot of
12 effort, the bottom line of which quite likely will be that you
13 are not going to get it anywhere. So what's your response to
14 that?

15 MR. MASTRO: If I may, your Honor? Mr. Snader and
16 Nextent we view as co-conspirators with Donziger. They
17 solicited Mr. Snader, solicited funders, like Ross DeLeon the
18 Internet gambling fugitive felon living in Gibraltar. And we
19 believe that these documents could show that he was aware that
20 this was a fraud, yet they pursued enforcement activities
21 despite the fact that he would have been privy to the fact that
22 this was a fraud.

23 So, we're really trying to get those documents to show
24 that this is a person knowingly seeking to enforce a judgment
25 that he knows was procured by fraud which we think is a fraud.

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1 THE COURT: Now, the narrow issue here is not a
2 general objection to Requests 31 and 32. It is, rather,
3 whether I should permit discovery.

4 MR. MASTRO: Understood.

5 THE COURT: Post the defendant's date?

6 MR. MASTRO: Yes, your Honor.

7 THE COURT: Right.

8 MR. MASTRO: Yes, your Honor.

9 THE COURT: OK. As to that limited. I am sorry.

10 MR. VESELKA: As to how it's presented and why it's
11 here in Exhibit A on that issue --

12 THE COURT: OK.

13 MR. WERDEGAR: Your Honor, I think our position more
14 broadly is irregardless of the date cut-off whatever discovery,
15 whatever the temporal scope may be, we do believe that
16 discovery into ongoing and contemplated enforcement proceedings
17 and is inappropriate. It's not simply the date range. That's
18 why it also appears in the Exhibit B portion.

19 THE COURT: I'm only dealing with the Exhibit A
20 portion right now. So as to 31 and 32 the cut-off date is
21 February 14, 2011 and we'll see whether those survive at all.
22 But assuming that they're at issue later on but we're only at
23 this point talking cut-off date.

24 OK. Now we're going to go to 119. And 119 is all
25 documents relating to communications with foreign governments

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1 in connection with any attempt it enforce the judgment. And
2 that's been modified. And it's not any longer all documents
3 related to but, rather, all communications.

4 MR. MASTRO: Yes, your Honor.

5 THE COURT: Same ruling.

6 MR. MASTRO: Your Honor, any documents that might be
7 relevant in this category would necessarily have occurred after
8 February 14, 2011 because the communications about enforcement
9 would occur after the judgment was entered. That's why we
10 thought it was appropriate that the date be extended out.

11 THE COURT: OK. Why shouldn't I just -- I am sorry.

12 MR. VESELKA: I was just going to respond, your Honor,
13 that the Invictus memo which is they've dealt with before was
14 before that. So to the extent it could have been contacts with
15 various governments at some point before the judgment. So it
16 would pick up things if there had been those at that time
17 which --

18 THE COURT: OK. The cut-off is 2/14/11 except as to
19 Brazil, Argentina and Canada as to which it's the later date.

20 OK. So we have now knocked off one whole category.
21 Just look at that. Let's go to category five and see if we can
22 continue on the roll. So that's request 23, 83, 86 and 87.

23 OK. Number 23, obviously, what you are looking for,
24 Mr. Mastro, is that you hope there will be correspondence that
25 will reveal that some of these law firms got out of this

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1 situation because they were persuaded that something was going
2 on which wasn't according to --

3 MR. MASTRO: Correct, your Honor.

4 THE COURT: OK. Let me hear from the defense.

5 MR. VESELKA: With the February 14, '11 cut-off that
6 was still address any actions that were taken by any of these
7 firms with regard to the notoriety. We say that arose once the
8 1782 started, once the action with regard to Cruz so there was
9 a good portion of the efforts by Chevron in the press and
10 through the 1782s and other ways to raise issues that is what
11 they're suspecting led to what they think as to certain firms
12 so that they would be getting a substantial period of time. It
13 would be hard to think of who was wanting to get out after
14 February 14th when there was now a judgment.

15 THE COURT: So that says to me no harm, no foul.
16 What's the problem?

17 MR. VESELKA: Well, I think it's saying that they were
18 going to get -- if it's anything that they want I think they're
19 going to get it subject to what all privilege issues are going
20 to be get dealt with at the appropriate time.

21 THE COURT: Ergo, what's the harm?

22 MR. VESELKA: They don't need the time later as to
23 that and they can't show that they -- they don't know if any
24 pure fishing in that sense at that time.

25 MR. WERDEGAR: Your Honor, this is a theme that will

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1 continue so I'll try not to repeat it, but a problem with a lot
2 of these where we think they're seeking discovery about which
3 there's no allegation haven't been any particularized
4 allegations either in the complaints or otherwise beyond the
5 14th is the -- it's not purely relevant. It's also the burden
6 and expense of having to continue to search for, gather,
7 review, log and produce all these materials. And I think that
8 there is -- so, it's the practical, the benefit to them versus
9 the ongoing burden and expense to the defendants of having to
10 deal with what has really been an onslaught of discovery for
11 many years now. So I want to make sure that the Court keeps
12 that in mind.

13 THE COURT: Sure, I'll keep it in mind but seems to me
14 it's very overblown. What you've got is Patton Boggs which
15 we're handling in another way. You've got Mr. Donziger. And
16 at least in theory they already have his documents up to about
17 a year or so ago. So we're not talking about very much. And
18 I'd rather imagine that his habits with respect to the
19 retention of documents changed dramatically about the time they
20 got his materials and there's not much there. And then what
21 we've got is either nothing at all or a handful of things.

22 Would I be wrong in supposing that's the lay of the
23 land, Mr. Werdegarr?

24 MR. WERDEGAR: Well, your Honor, there is -- it's the
25 universe of materials. They have his materials at least for

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1 e-mail up until about February of 2011 and paper documents as
2 far as 1728 went. There wasn't anything generated after that
3 period of time. And I don't know that the relevant volumes is
4 in the thousands, perhaps, tens of thousands of pages of
5 material has to be reviewed, cataloged and much of it is
6 privileged because not only privileged vis-a-vis the litigation
7 in Ecuador but also at that point in time this case had started
8 up and so there's communications pertaining to this case and it
9 has to be gone through. It's not an insignificant amount.

10 THE COURT: Are you suggesting to me that he's got
11 documents relating to the withdrawal or resignation of lawyers
12 in this case and that looking for them would be very
13 burdensome?

14 MR. WERDEGAR: I am suggesting, your Honor, that as an
15 individual he has an e-mail account and so it's not like a
16 large law firm like Patton Boggs where things might all be
17 categorized. You might have to go through the mass of
18 information as we go through letters to withdraw or other
19 topics, you still have to get through that entire body of
20 information.

21 THE COURT: As applied to Mr. Donziger a two person
22 show and an e-mail account, I am just not impressed. Indeed
23 the fact that it's an e-mail account if that's the bulk of it
24 makes it ever so much easier in electronic form and you can go
25 through it easily. So the date on number 23 is July 10, 2012.

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Hearing

1 Let's go to number 83. Look prima facie seems to me
2 that status is a key player here and that they're entitled to
3 it. Why not, folks? When I "say entitled to it" I mean down
4 to the later date. That's what I am talking about now.

5 MR. VESELKA: They would be co-defendant after this
6 case is started.

7 THE COURT: Sure.

8 MR. VESELKA: So if it's going to involve an even
9 further step with regard to the common entrance communications
10 and things of that sort that may protect in the privilege. So
11 the burden of trying to go through all that for what might
12 ultimately be obtained seems to be not commensurate with what
13 that would be as opposed to getting other things that we need
14 to be getting down to prepare for trial.

15 MR. WERDEGAR: This is drafted as broadly as it could
16 be drafted and it's not limited to documents concerning
17 Stratus' work in connection with litigation in Ecuador. And
18 because they are now a co-defendant and we're commonly having
19 to defend against Chevron's allegations I, certainly, would
20 hope that this is not to be read to include communications
21 pertaining to the defense of this case as opposed to the events
22 here that underlie this action.

23 THE COURT: But the problem about that that
24 immediately occurs to me is the communications about the
25 defense of this case involves almost by absolute necessity

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Hearing

1 communications about whether and to what extent Stratus rather
2 than Cabrera, wrote the Cabrera report? Whether and to what
3 extend they lied in the 1782 proceedings? Whether and to what
4 extend they muscled employees to give false evidence or no
5 evidence at all in 1782 proceedings? And a whole bunch of
6 other related subjects that are very much at the heart of this
7 lawsuit and on which I imagine we'll have some conversations
8 about the crime fraud exception but we'll see. But to just cut
9 out anything that relates to the defense of a lawsuit seems to
10 me unworkable.

11 Now, maybe there's some more precise way of dealing
12 with that problem but it doesn't occur to me offhand. And
13 after all what we're talking about here at the moment is only a
14 very small incremental point. And the very small incremental
15 point is should the cut-off date be February 14th of 2011 or
16 July 10, 2012 which is 17 months?

17 MR. VESELKA: Yes, your Honor. You just described
18 though what could be a distinction, if it's documents just with
19 regard to responding to the defense as opposed to documents or
20 the portions of the document dealing with the facts of what
21 occurred with regard to Cabrera are in the 1782 or any of those
22 other actions prior to the lawsuit that that may be a
23 distinction right there that the Court could draw.

24 THE COURT: I am not sure I understand it.

25 MR. VESELKA: You are referring to how you thought it

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1 might be relevant or temporally to have documents after
2 February 14, 2011, if the documents were discussing Stratus'
3 involvement vis-a-vis the Cabrera report or affecting what
4 people were willing to do or not do and in how to respond to
5 1782. If the request here were limited to items about that as
6 opposed to items about defending the case in this instance what
7 motions to file, what witnesses to look for and things that
8 there might be a way to remove some of the burden of preparing
9 and/or logging and/or going through the process later.

10 THE COURT: OK. I have your point. I'll tell you
11 what. My inclination is to run it through to July 10th of
12 2012. But you've said enough to make me think that if you and
13 Mr. Matro sat down you might be in a position to come to some
14 limitation that would limit the post February 11 material in
15 some way that might help. I am not sure but it's worth a shot
16 and maybe you can invite Mr. Boehner and the president maybe
17 you'll even make a grand bargain. Who knows? But I am not
18 holding my breath for either one. Hopeful but not naive.

19 OK. 86 and say 87. Who associates Juan Cristobal
20 Delano Apez.

21 What's the story here, Mr. Mastro?

22 MR. MASTRO: Your Honor, this is in its own way a
23 subset of Cabrera fraud and ghostwriting fraud.

24 THE COURT: Who was one of the so-called -- experts?

25 MR. MASTRO: No. Your Honor, Delano who was somebody

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1 who was working for Yul was put forward in the Cabrera report
2 as if he were part of Cabrera's independent team. In reality
3 he was on the payroll. Yul and their worker Delano were on the
4 payroll of the plaintiffs. There was a report prepared on
5 Potable Water and, in fact, the test run that's been given to
6 date represented by the way, Yul represented by Patton Boggs
7 the test run today has been, even the report that was prepared
8 Mr. Fajardo, apparently, altered in material ways to give a
9 false impression that there was some huge damage resulting from
10 this when, in fact, the report os originally written --

11 THE COURT: Got it. Let me hear from the other side.

12 MR. MASTRO: One next thing, your Honor. We haven't
13 been able to get the discovery yet because Patton Boggs has
14 managed so skillfully to obstruct in New Jersey so far. But
15 anyway, thank you.

16 THE COURT: In New Jersey? Oh, that's another matter,
17 yes.

18 MR. WERDEGAR: Your Honor, very briefly we've agreed
19 to produce everything up to the 14 so it is a timeframe to a
20 relevance issue. Except to the extent that all this work that
21 they're talking about all the alleged wrongdoing I think -- I
22 don't think there's a dispute that it all took place before
23 that time. So it's the burden of having to chase after --
24 additional documents.

25 THE COURT: It's another search term or 17 months is

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1 what it is. July 10, 2012.

2 OK. Two categories completed. Let's try something
3 more burdensome. The Agency Theory one, 11 through 14 and 24.

4 OK. My first reaction to these are the following:
5 That I would run the time period to July 10, 2012 on one and 12
6 through 14 but not even 11. I imagine we may get to questions
7 about whether these should be complied with at all later on but
8 just on the time period. Because it seems to me that documents
9 related to the payment of these folks goes pretty directly to
10 motive if nothing else certainly does.

11 The issues as to authority go to all kinds of
12 questions including the responsibility of the lapse for the
13 action of Donziger and Patton Boggs and Fajardo and Yanza and
14 Prito and Syance and so forth. And in general -- goes to
15 jurisdiction anyway. But I am happy to hear any contrary view.

16 MR. VESELKA: As to jurisdiction, if the Court's
17 referring to personal jurisdiction, I don't believe actions
18 taken after this case is filed can determine personal
19 jurisdiction.

20 THE COURT: Yes, that's probably true. I think you've
21 got a good point on that. But on the other hand, doesn't it go
22 to your Morrison argument regardless of when it happened?

23 MR. VESELKA: I don't follow how so but --

24 THE COURT: Well, you sought dismissal of the RICO
25 claims on the ground that applying RICO here would be an

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1 impermissible extraterritorial application of the statute.

2 MR. VESELKA: I represent Camacho.

3 THE COURT: That was a generic "you".

4 MR. VESELKA: That was alleged against you. We
5 didn't --

6 THE COURT: Yes. I understand. It seems to me that
7 where any tortious behavior was going on and by whose authority
8 may, ultimately, prove of significance to the Morrison question
9 at trial, no?

10 MR. VESELKA: I am not following the logic of how that
11 would trump the issue. I am trying to create personal
12 jurisdiction arising after the case.

13 THE COURT: No. I am discussing it. I at least
14 tentatively concede your point, the point as to which you
15 consider personal jurisdiction. I'd like to think about it
16 some more before I decide it but I think you are probably right
17 but quite apart from personal jurisdiction.

18 MR. VESELKA: As it goes to claims related to the
19 RICO.

20 THE COURT: No. As it goes to personal jurisdiction
21 against your clients in particular, it may not be of
22 significance. But the question may be relevant to whether and
23 to what extent Chevron is seeking an extraterritorial
24 application of RICO, I am not sure about that but it seems that
25 it may be.

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Hearing

1 Mr. Werdegar.

2 MR. WERDEGAR: Your Honor, frankly, this is the first
3 I am hearing. I am thinking on my feet a little bit.

4 THE COURT: God, I hope not. I'll give you first time
5 today.

6 MR. WERDEGAR: It does -- it occurs to me that with
7 respect to the Morrison issue you know sort of where things are
8 and there's the various tests that are kind of revolving out
9 there how to apply that to RICO. But, certainly, proving who
10 did what in the United States versus who did what in Ecuador
11 will be relevant to that question. But because -- beyond the
12 fact that the Ecuadorian plaintiffs have hired the lawyers in
13 Ecuador and have retained lawyers in the United States, I don't
14 know how documents about, just about whose power of attorney or
15 retention we've agreed to produce through a period of time, I
16 don't see how that's going to shift the balance in terms of
17 center of gravity or whatever tests you apply in terms of the
18 RICO, the locust of the RICO for purposes of Norex and
19 Morrison.

20 MR. VESELKA: And I understood the Court that we are
21 referring to Question 11.

22 THE COURT: No. We were talking about -- well, it's
23 11 but it's also some subsequent ones.

24 MR. VESELKA: So as to 11 since it's only dealing with
25 the counsel --

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1 THE COURT: I understand that.

2 MR. VESELKA: Right.

3 THE COURT: I started out by saying I thought 11 was a
4 shorter topic.

5 MR. VESELKA: Right.

6 THE COURT: So, Mr. Mastro, what do you got to say on
7 this?

8 MR. MASTRO: Well, your Honor, I think, your Honor --

9 THE COURT: I'll bet you'll draft more precise
10 document requests in the future, won't you?

11 MR. MASTRO: I appreciate the Court's time in going
12 through each of these. And the answer is "yes". But, your
13 Honor, seems to me they are relevant on multiple levels to go
14 beyond the timeframe. But also they go to responsibility,
15 culpability, liability, issues, relationships between Donziger
16 and his supposed clients and these other law firms and what
17 they're doing as a matter of their own criminal activity. I
18 think that we're allowed to probe that and it's highly
19 relevant. I understand the distinction on 11 but I think that
20 one, 12, 13, 14 and 24 all should go to the later date.

21 THE COURT: Well, I imagine we're going to revisit
22 this overall substance later but on one, 12 through 14 and 24
23 will go to July 10, 2012 and on the number 11 we'll go to
24 February 14, 2011. I think that's the right date.

25 OK. So let's go to category two, money flow and so

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1 forth.

2 MR. MASTRO: And, your Honor, I am reminded there are
3 two more to add there, so 27 to 34 the sequence, actually, goes
4 25 through 30 then 33 through 35 and then 115.

5 THE COURT: Sorry. 25 to 30.

6 MR. MASTRO: 33 to 35 and 115 to 118.

7 THE COURT: OK. Well, let's start with 25 to 30 and
8 focusing just on time period, what practical difference does it
9 make if it goes to the more recent date to whatever extent they
10 understand all together? Anybody want to take that on the
11 defense side?

12 MR. VESELKA: I don't believe it would be
13 substantially different. There may have been additional
14 counsel hired for appeal to pick up one additional counsel.

15 THE COURT: OK. So the cut-off date for 25 to 30
16 would be July 10th.

17 MR. VESELKA: I was addressing 25. I apologize, your
18 Honor.

19 THE COURT: Look at the others.

20 MR. VESELKA: The others 26 because it did deal with
21 documents with regard to all docks raised -- This is such a
22 mishmash of between funders versus counsel versus NGOs. I have
23 trouble dealing with how that goes. There would be -- it would
24 be substantially more burdensome to deal with just because of
25 that mishmash and the funding part would -- there would be

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1 substantially more after February 14, 2011.

2 THE COURT: Mr. Werdegar.

3 MR. WERDEGAR: Your Honor, just beyond what's already
4 been said really our concerns here is not so much timeframe and
5 scope of the priority of the requests overall.

6 THE COURT: All right. Now is that true also through
7 number 30?

8 MR. WERDEGAR: That's through the series 25 through
9 30, your Honor, yes.

10 THE COURT: OK. I imagine we're going to revisit subs
11 substantively but the cut-off date is going to be any discovery
12 on 25 through 30 would be July 10, 2012. Let's look at 33
13 through 35.

14 You know, Mr. Mastro, I've got to tell you 33 looks so
15 overbroad to me. Why is -- also 34.

16 MR. MASTRO: Well, your Honor, in both of those
17 instances these were vehicles for making the illicit payments.
18 The Kohn firm's is the ones that would wire the funds into the
19 secret bank account or into the Selva Viva account and so --

20 THE COURT: Well, you said it. I understand. I
21 hadn't focused on that. What have you got to say to that,
22 gentlemen at the back table?

23 MR. WERDEGAR: Your Honor, to the extent we're talking
24 about sort of the breadth of the these requests as opposed to
25 timeframe, we've agreed to produce documents related to any

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1 payments involving Cabrera, any court appointed expert and any
2 payment to any Ecuadorian judicial official or government
3 official, so we've offered to produce that and we agree that
4 they can get that. What our problem is that they seek every
5 piece of paper of any sort related in any way to the funding or
6 expenditures for litigation and it's stuff that has no bearing
7 on the actual allegations to fraud.

8 THE COURT: Right now we're on time period. Time
9 period on those two is July 10, 2012. I imagine we will be
10 revisiting scope later, right?

11 Any reason why it shouldn't be the same ruling on 35?
12 Same ruling.

13 115 to 118, anybody with anything to add on time
14 period?

15 MR. VESELKA: We could accept that adding the time
16 period dealing with all of the various documents about trust
17 that would be set up pursuant to the judgment and it would be
18 an increased burden if everything's going to have to be logged
19 and fought through in that regard and it wouldn't change the
20 issues as showing any potential liability for the fraud that
21 was discussed before.

22 THE COURT: Mr. Mastro?

23 MR. MASTRO: Well, your Honor, again, I think that as
24 to this entire group of requests many of the relevant documents
25 are likely to be in the period post judgment. They go to

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1 allocating, secreting, selling off pieces and so I think that's
2 why we feel if we are going to get substance under period the
3 time cut-off should be the June.

4 THE COURT: The time period is July 10, 2012.

5 Last group, the collusion ones, 98, 99, 105, 106, 108,
6 110 and so on.

7 MR. MASTRO: And, your Honor, I am reminded by my
8 colleagues two more to add in that category, 39 and 81.

9 THE COURT: All right. We'll start with 39 and maybe
10 we can speed this up. I mean my basic view here is that the
11 time period should go to the later date but if there's some
12 particular reason why defense counsel thinks it should be the
13 earlier date and that that would really matter in some way, I'd
14 like to know that.

15 MR. WERDEGAR: May we have a moment, your Honor?

16 THE COURT: Sure. In fact, if you'd like we could
17 take a five minutes recess and you could go through them.

18 MR. MASTRO: Thank you very much your Honor.

19 (Recess)
20
21
22
23
24
25

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Hearing

1 (Continued on next page)

2 THE COURT: Just a word on scheduling. We're going to
3 go to about five to 1:00 and come back after lunch. Andy tells
4 me we have to finish this this afternoon because the Mayan
5 apocalypse.

6 What about this latest bunch?

7 MR. VESELKA: Your Honor, I believe that we have
8 concerns about the temporal issue in particular with regard to
9 98, 99, 105 and 108. I hadn't gotten all the way to the 121
10 through 25. Because to the extent that those issues are
11 looking at unfiled documents that may have been in the judgment
12 or other items, the way it is written it will require any time
13 any of the parties in this case are in any of the related
14 actions, we would have to be addressing every time we discussed
15 that. It would be a substantially burdensome search for
16 documents that would clearly be work product and/or
17 attorney-client privilege in just trying to defend this case as
18 to those items.

19 THE COURT: Let's just take a look at that.

20 MR. VESELKA: 98 might inquire us to be producing
21 documents that are they have would have gotten. They are parts
22 of the record in the appellate case.

23 THE COURT: 98 I think it is limited to documents
24 related to communications ultimately with the Ecuador courts,
25 right?

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1 MR. VESELKA: Yes, your Honor.

2 THE COURT: We're not talking about the U.S. 99, that
3 is obviously true. 105 is certainly limited to Ecuador. 105
4 is limited to Ecuador. So is 106, right?

5 MR. MASTRO: Yes, your Honor.

6 THE COURT: And 108? Certainly because I assume the
7 capitalized words are the defined term that I am familiar with
8 from the summary judgment motion?

9 MR. MASTRO: Yes, your Honor.

10 THE COURT: And 110 likewise. Here is what we're
11 going to do: We're tentatively going to make this all
12 July 10th, 2012, but I will revisit that in some way if you
13 folks can't work out -- and I think it is most acutely a
14 problem and maybe exclusively a problem with 98 -- some
15 limitation that would somehow pull out of this documents that
16 are just communications that relate to some item that got filed
17 in the Ecuadorian litigation as to which there is no issue of
18 ghost writing or any of the other things that the plaintiffs
19 have been talking about. Do you think that is doable,
20 gentlemen?

21 MR. MASTRO: I think so, your Honor.

22 MR. VESELKA: I believe it would be worthwhile for us
23 to explore and confer and find some limitation that carves out
24 part of what would not be on the later time frame. Yes, your
25 Honor.

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1 THE COURT: I think that is worth a try anyway. So on
2 this whole group then are there any other individual ones we
3 need to revisit?

4 MR. WERDEGAR: Your Honor, just with respect to 108,
5 which relates to their define term unfiled Lago Agrio
6 plaintiffs work product. There, your Honor, when you get
7 beyond February 14th, 2011 is that problem where there could be
8 documents and communications, and certainly there are,
9 pertaining to those materials in the sense that it is a big
10 part of Chevron's allegations in this case and so you are
11 having -- this document communicates pertaining to how do we
12 address these allegations.

13 THE COURT: Same problem. So I leave with you trying
14 to work out a carve-out particularly for essentially briefs and
15 drafts of briefs in this case discussing that stuff.

16 Are you with me, Mr. Mastro.

17 MR. MASTRO: I am, your Honor, but I would add this
18 though for your consideration: This goes to us the heart of
19 the judgment ghost writing and the communications afterwards.
20 We think this goes to the heart of one of the crime fraud
21 issues in the case the extent to which the judgment was ghost
22 written by the plaintiffs and their original product was used.
23 So they should be logging that postjudgment period when they
24 are talking about, Wow, how the hell are we going to cover this
25 one up.

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1 THE COURT: I am not disagreeing with that. I am just
2 raising the possibility that there may be some subset of stuff,
3 certainly stuff that winds up being filed in this case. Those
4 are documents relating to.

5 MR. MASTRO: Hope springs eternal. So I will hope to
6 work out a carve-out. I am just explaining to your Honor why
7 it is a problem.

8 THE COURT: I understand.

9 MR. MASTRO: Thank you, your Honor.

10 THE COURT: You will report back to me on 98 and 108,
11 but otherwise for this whole group it is July 10, 2012. So
12 that takes care of the time period stuff I think, right?

13 MR. MASTRO: Yes, your Honor.

14 THE COURT: Now we'll get a start on and maybe finish
15 Category B1. So if I haven't skimmed this over too quickly
16 again and if my memory is accurate Category B1 is a narrow
17 proposition and is analogous to something I have already ruled
18 on. Do I correctly understand that the plaintiff wants a lot
19 of discovery about possible ghost writing by the plaintiffs or
20 their affiliates of various Ecuadorian judicial decisions and
21 the like and the defense takes the view that the motion to
22 compel is limited to possible ghost writing of the appellate
23 decision in the intermediate appellate court in Ecuador and
24 that the plaintiff shouldn't get that because they haven't up
25 to now made a specific allegation about that particular paper;

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1 is that an accurate summary of the dispute?

2 MR. VESELKA: It's accurate that we don't believe
3 paragraph 327, which raises issues with regard to a
4 constitution of the appellate panel does not raise issues of
5 ghost writing of the decision that later emanated from the
6 appellate panel and that they have nothing but a pure fishing
7 expedition to do anything with regard to ghost writing of any
8 part of the appellate decisions.

9 THE COURT: Therefore?

10 MR. VESELKA: Therefore, if it is overbroad and not
11 relevant to the claims of the case are overbroad to be fishing
12 for maybe the ghost wrote something else and we don't know
13 about it as opposed to having addressed the ghost writing
14 alleged in the complaint, which was merely the ghost writing in
15 the original judgment.

16 MR. WERDEGAR: Just to add briefly to what Mr. Veselka
17 said they haven't -- there is no allegation of ghost writing.
18 There hasn't been in there --

19 THE COURT: There couldn't have been when the
20 complaint was filed, there was no appellate decision in
21 existence.

22 MR. WERDEGAR: But I haven't seen it elsewhere either,
23 your Honor, in their pleadings, a specific allegation or
24 evidence of an appellate ghost writing. I apologize if I
25 missed something, but I don't believe I have seen that. This

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1 goes to the idea of this is -- it is sweeping into our already
2 broad scope of this discovery, your Honor. Basically the
3 entire appellate process down in Ecuador and to the extent that
4 there are concerns about seeking discovery from a lawyer and
5 law firms involved in litigation, about that litigation, I
6 think that is heightened when that litigation process is still
7 ongoing and I think they need to come forward with some sort of
8 specific allegations and essentially offer of proof or
9 evidentiary showing before that door should be opened rather
10 than say, Well, it relates to our conspiracy generally and we
11 are interested and we think something may have happened. I
12 don't think that is enough to get this kind of broad new range
13 of discovery, your Honor.

14 MR. VESELKA: They at least had the opportunity to
15 amend if they had some sufficient basis to make an allegation.
16 They could have amended as late of August 15th or 22nd of this
17 year, just four months ago, after the appellate decision has
18 come out. So they forgo or forwent that opportunity.

19 MR. MASTRO: Your Honor, as your Honor knows we had
20 amended as of rights shortly after the filing of the complaint.
21 We could not possibly have therefore included at that early
22 stage what really is deja vu all over again. We flagged even
23 if that amendment that there seemed to be certain improprieties
24 in the selection of the judicial panel, something that was
25 supposed to happen by random draw and the appellate panel.

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1 There were so many shifts. But, your Honor, we also have
2 uncovered, and I am happy for share with the Court now and we
3 will be developing this evidence further as with the
4 irregularities in the judgment, in the appellate decision, we
5 have uncovered that in fact somehow incredibly a draft was
6 issued prematurely to a press organization in Ecuador. That
7 draft appears on its face to have come from a source other than
8 the courthouse and even seems to have an identification number
9 for an ROE government agency. It has different formatting, much
10 the same substance but different formatting. That was leaked to
11 a press organization before the final opinion had actually been
12 released. It had no presiding listed judge on it, but a
13 handpicked presiding judge in this bizarre process of changing
14 the panel shows up in the final version the next day.

15 Your Honor, it looks like once again like ROE
16 collusion with the lapse to manipulate even the appellate
17 decision. So we believe that we have more than sufficient
18 evidence to explore what happened there and have the LAPs
19 colluded with a ROE to basically put up a trumped up appellate
20 decision rubber stamping the opinion while trying to improve
21 their position and enforcement.

22 MR. VESELKA: We have plenty of real issues that have
23 been joined and documented in evidence to deal with in this
24 case. For them to dream up that something got to the ROE when
25 the appellate panel was going to release a decision that had

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1 such a potential interest to the government that if somehow the
2 ROE saw a draft of that nowhere in there did he say that he has
3 got any evidence or any good faith claim that any of the
4 defendants had anything to do with that draft going to ROE or
5 to the press. So that shows how they are trying to go on
6 various fishing expeditions. If they had some basis, they
7 could have amended as late as four months ago and alleged it.
8 They decided not to and left it with the allegation as to the
9 makeup of the panel.

10 MR. MASTRO: Your Honor, just one quick thing. This
11 was all under Zambrano. It is not an appellate panel in the
12 sense we have a Second Circuit and it is a separate court.
13 Zambrano was still pulling all the strings on the appellate
14 panel that kept shifting, even putting in substitute judges to
15 make sure they had it wired. We believe that there will be
16 relevant discovery about the role that the plaintiffs and
17 Donziger played in those machinations with the ROE and Zambrano
18 and the appellate decision being produced and approved by a
19 manipulated panel.

20 THE COURT: Just give me a second here.

21 Go ahead. Mr. Mastro's fertile imagination using his
22 background as a prosecutor where they get very imaginative as
23 to what they think may be out there. I don't want our silence
24 to count. So we believe that there is involvement with
25 defendants with regard to any of that. Just like we don't

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1 believe it is appropriate to refer to elements of a fugitive.
2 I believe that is a proper characterization.

3 The issue is he is speculating a lot and with all we
4 have got to deal with to try to get ready I think expanding
5 discovery in these other areas imposes a burden and imposes a
6 burden on the whole process of this case to go through all of
7 those issues to where we're running down rabbit holes.

8 THE COURT: There is a great deal of evidence in this
9 case that the defendants ghost wrote the Cabrera report or most
10 of it. There is a great deal of evidence in this case that the
11 defendants got the then presiding judge to terminate the
12 judicial inspection process and to appoint a global expert at
13 least by threatening him with a disciplinary complaint. There
14 is a great deal of evidence that they got Cabrera appointed,
15 their chosen individual, by the same means. There is a great
16 deal of evidence that they and Cabrera both falsely represented
17 that Cabrera was independent. There is a great deal of
18 evidence that they had stratused the principal author of most
19 of the Cabrera report and on defendant's payroll wrote and
20 published a critique of the Cabrera report which they
21 themselves had written in order to create the appearance that
22 the defendants had some problems with the Cabrera report and
23 thus to bolster the public perception that was independent and
24 we have a trial court decision that contains at least one
25 significant and substantial passage that will is lifted right

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1 out of a document prepared by the defendants that was never
2 publicly filed in the Court, alternatively I suppose that the
3 defendants wrote all or part of the trial level decision in
4 Ecuador.

5 There is a great deal of evidence of cooperation
6 between the defendants here, plaintiffs in Ecuador and
7 government of Ecuador. There is a great deal of evidence that
8 indicates significant issues with respect to the independence
9 and fairness of the Ecuadorian judiciary, particularly in cases
10 of this nature. And I do not regard this discovery in general
11 without regard to particulars of particular requests at all
12 inappropriate. I probably would not regard it as inappropriate
13 even without that huge evidentiary record, most of which has
14 been unanswered by the defendants over a period of what is now
15 a couple years. Indeed, as to many elements I have already
16 found that there are no genuine issues of fact as to most of
17 it.

18 Moreover, if the plaintiffs succeed in finding
19 evidence suggesting ghost writing or other misconduct involving
20 the defendants with the appellate decision, that would be
21 admissible I believe, though I don't need to decide it now, as
22 probative of whether similar misconduct occurred with respect
23 to the trial court decision under 404(b) among other
24 principles.

25 So in principle the discovery is going to happen. Now

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1 the details, however, we need to sort out because I am mindful
2 of issues of burden and overbreadth and some of these other
3 things. So I take it what we have here are three requests.
4 Donziger 121, 123, 124, 125.

5 MR. VESELKA: And 121, sir.

6 MR. MASTRO: Yes, your Honor.

7 THE COURT: Did I skip one?

8 MR. MASTRO: Right.

9 MR. VESELKA: 120, 121, 123, 124 and 125.

10 MR. MASTRO: There are five in all, your Honor.

11 THE COURT: Thank you. I stand corrected. We're on
12 substance so let's take up 121. The argument is I take it it
13 is irrelevant because the complaint doesn't allege misconduct
14 with respect to the appellate decision. Is that about the size
15 of it, gentlemen?

16 MR. VESELKA: We had agreed it would be relevant to
17 produce documents with regard to what led to the makeup, any
18 documents that we have that led to the makeup in the
19 constitution of the panel.

20 THE COURT: Right. Your objection is going beyond the
21 makeup?

22 MR. VESELKA: Right.

23 MR. WERDEGAR: Yes, your Honor. That with the overall
24 burden of having to gather and review and log documents in this
25 time frame, but I think you have rejected most of the primary

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1 basis that I would assert.

2 THE COURT: This was on 120. So 120 the objections
3 are overruled. Is it any different on any of these others?

4 MR. MASTRO: I don't believe so, your Honor.

5 THE COURT: Let me give the defense a chance to
6 disagree with you.

7 MR. MASTRO: Certainly, your Honor.

8 MR. VESELKA: Well, I think again 121 appears to track
9 into these issues where we pick up anything that was being
10 filed with the appellate court or work being done. It's just
11 part of the normal process of defending the appeal. So the
12 burden of having to go through all of that part is maybe part
13 of that issue as to whether there can be a defined carve-out of
14 some aspect of the --

15 THE COURT: Look, I can see that. That can't be too
16 hard to deal with. A cover letter saying, Dear Clerk of Court,
17 here is our filing on thus and such. You are not looking for
18 that, Mr. Mastro, right?

19 MR. MASTRO: No. I think our definitions, your Honor,
20 made clear that the things that were officially submitted to
21 the Court on the record are not covered by that request.

22 THE COURT: Is that accurate? Does that solve your
23 problem, Mr. Veselka?

24 MR. VESELKA: Well, no, your Honor. Because to the
25 extent that there are communications between counsel or between

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1 counsel and client with regard to what was going to be filed,
2 to discuss what is going to be filed as opposed to discussions
3 pertaining to the issue of that what he is speculating about
4 something being slipped over that is not being filed,
5 communication other than that is going to be through normal
6 court channels.

7 THE COURT: So just so I can share my thinking with
8 you -- and if I am going down a rabbit hole, you will tell me
9 and if you think I am right, I will change my view -- on these
10 we are dealing with questions of relevance in general for
11 reasons I have indicated I think it is appropriate discovery
12 because it is likely to lead to relevant material. I am not
13 trying to quote the standard exactly, but that is the general
14 drift. It may be that you will have some work product
15 objections with respect to discussions among counsel with
16 respect to what you ought to file, what it ought to say and the
17 consequence of my overruling your objection here is simply that
18 you are going to have to schedule them on a privilege log and
19 then I am going to have to decide a couple of things. The
20 first thing I am going to have to decide is whether there is a
21 factual basis giving rise to a reasonable suspicion, I believe
22 it is in my opinion of yesterday, of crime fraud, basically
23 probable cause more less, and if this particular document was
24 in furtherance of that crime fraud.

25 Now, I rather imagine that in this category we're

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1 going to have to go all the way on that, but what I am hoping
2 is that you folks can work together to draft carve-outs for
3 this small group of requests that will avoid the need to
4 schedule things like transmittal letters and the like that
5 nobody is interested in and everybody knows nobody is
6 interested in but nobody has taken the time yet, not that you
7 all have greats amounts of time on your hand, but nobody has
8 figured out how to picking up in the net. We can reduce the
9 burden on everybody on that and if so that is fine. And if not
10 it may ultimately be me, ultimately more things for me to be
11 looking at in camera and I will be aggravated looking at
12 transmittal letters and so what is the bottom line. That is
13 the way I am viewing it.

14 Does anybody think I am missing something?

15 MR. MASTRO: We don't have any problem trying to do
16 that, your Honor. I just a wanted the Court to know we think
17 we already defined --

18 THE COURT: Defined it out.

19 MR. MASTRO: We defined that out. This is a red
20 herring just like on the earlier issue with court filings.

21 THE COURT: So you need to sit with each other and
22 either convince the defense, Mr. Mastro, that it is already
23 carved out or if it is not carved out figure out a better way
24 to do it.

25 MR. MASTRO: Certainly, your Honor.

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1 THE COURT: I would like to you do that and I would
2 like everybody to do that.

3 Now, putting aside that kind of stuff is there
4 anything else left on this Exhibit B1 that requires individual
5 discussion?

6 MR. WERDEGAR: Your Honor, just the only other point
7 and this may be very much what we need to meet and confer with
8 Mr. Mastro further about this is Donziger 121, which unlike the
9 others that are focused on things outside the record that may
10 have made to appellate court and the like this seeks all
11 documents related to any communications between really anyone
12 between or among the plaintiffs side of the case regarding --
13 it says, All documents relating to any communication with the
14 appellate court or any Ecuadorian court. So the communications
15 are one thing, but then it is asking for any internal
16 discussion or communication pertaining to those. It is not --
17 it is related to Chevron litigation, which is broadly defined.
18 So it is really asking for any internal communication that in
19 any way pertains to a communication with the Ecuadorian
20 judiciary and it just seems it goes beyond ghost writing and
21 alike.

22 THE COURT: It goes beyond ghost writing all right,
23 but can you suggest to me why for example just to take your
24 concern there could be any legitimate reason for anybody on the
25 Ecuadorian plaintiffs side of this case having an ex parte and

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1 secret communication with an Ecuadorian judge about what is
2 going on in the American litigation?

3 MR. WERDEGAR: Your Honor, the request is not limited
4 to ex parte communications. It is any communication with
5 anyone in the Ecuadorian judiciary. So that would be internal
6 discussions about the brief we are going to file tomorrow or
7 internal discussions about what we received from the court.

8 THE COURT: You had internal discussions about the
9 brief you are going to file tomorrow with an Ecuadorian judge?

10 MR. WERDEGAR: No. Maybe I am misreading this. This
11 is seeking all documents -- it is not just seeking the
12 communication with the Court. I understand that is one thing.
13 It is seeking all documents related to those. So a document
14 relating to communication would be -- could be any internal
15 discussion about do we send this letter, do we file this brief.
16 I get your point about the communications themselves. I am
17 raising the issue of the all documents related to.

18 THE COURT: I understand that point and I could
19 conceivably imagine -- and this is just a trial balloon on my
20 part. I haven't thought it through. I am not suggesting it.
21 There may be a way to take out of this preemptively the Court
22 of opinion work product about a document that ultimately gets
23 publicly filed in Ecuador. That is what you are concerned
24 about?

25 MR. VESELKA: That is what I tried to raise so

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1 unartfully beforehand.

2 MR. WERDEGAR: Yes. You hit upon my certain, yes.

3 THE COURT: Mr. Mastro, you need to talk to them about
4 it. That doesn't seem totally crazy off the face of it.

5 MR. MASTRO: Your Honor, the definition of Chevron
6 litigation doesn't include the Aguinda case so why are they
7 talking to Ecuadorian judges in the courthouse about their
8 filings and other cases?

9 THE COURT: Well, has that helped your memory on that,
10 Mr. Werdegar?

11 MR. MASTRO: I am sorry, your Honor. My colleagues
12 have corrected me. That the New York Aguinda case was exempted
13 from this grouping. So I will talk to him about that.

14 THE COURT: So now you can see what direction you need
15 to go in?

16 MR. MASTRO: I understand. Obviously we're not
17 talking about how they would prepare a brief.

18 THE COURT: Right. Given the hour I think we're
19 finished with B1. We'll resume with B3 at 2:30. Maybe you can
20 caucus over the lunch hour or not. We're not going to finish
21 today I can see that. So you will have a chance to do it
22 overnight. So we have three or four or five outstanding issues
23 here, but we're going to get this all done before the Mayan
24 apocalypse.

25 MR. MASTRO: Thank you, your Honor.

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(Luncheon recess)

A F T E R N O O N S E S S I O N

2:30 p.m.

THE COURT: Sorry to keep you. First of all, did you resolve any of these open issues over lunch?

MR. MASTRO: Your Honor, there was some discussion. I understand that they have to go back and talk to their colleagues.

MR. VESELKA: But we also spent some time looking on the forward to resolve some of the ones we're getting today, which ones are dealt with by the daytime and which ones we can start a group for you as we go so try to move it as expeditiously as possible.

THE COURT: Thank you. Okay, B3. Let me just scan for a moment. How to you propose we tackle these three?

MR. MASTRO: Your Honor, there are 16 particular requests and I think that in this category we have to go one by one.

THE COURT: Okay.

MR. MASTRO: They cover a variety of related but different subjects.

THE COURT: All right.

MR. MASTRO: Number one this applies to Mr. Donziger. It is to obtain information about his pay and compensation in connection with his work on the case.

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1 THE COURT: Why shouldn't I quote this?

2 MR. WERDEGAR: Well, your Honor, we have agreed to
3 produce his retainer agreements with Aguinda plaintiffs as well
4 as your ruling on the Patton Boggs executed funding agreements
5 to the extent Chevron doesn't already have them.

6 THE COURT: But I know you heard what I said about the
7 Patton Boggs claims.

8 MR. WERDEGAR: Oh, I understand, your Honor. I am
9 saying consistent with that these are what we have agreed to
10 produce. The question is beyond the funding agreements, which
11 lay out whose is investing and how people who have invested or
12 have a stake in the outcome on this as far as the legal side go
13 will ultimately be compensated should there be a recovery, we
14 don't see the relevance and certainly not the relevance
15 proportionate to the burden and intrusion of turning over every
16 document about what money Donziger has received in connection
17 with be it a monthly stipend as part of his work on case or
18 whatever it is. There is no question that he stands some
19 financial benefit should there be a recovery and that is their
20 motion theory, but why does every financial piece of paper
21 about his work on this case which has been a large portion of
22 his work over the years need to be turned over? It seems
23 intrusive and burdensome and to a degree far beyond what I
24 think is legitimately necessary for them to prove what they
25 intend it prove given what we have offered to produce.

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1 THE COURT: So far as intrusion is concerned, I gather
2 you folks have negotiated a confidentiality order, is that
3 right?

4 MR. VESELKA: We have.

5 THE COURT: I haven't signed it yet.

6 MR. VESELKA: There was one phrase that was disputed
7 between some of the parties, but it has been submitted.

8 THE COURT: I understand that.

9 What is the short answer to that argument?

10 MR. MASTRO: The short answer to that, your Honor, is
11 that Mr. Donziger and his financial arrangements with the LAPs
12 and the changes that have occurred in these financial
13 arrangements as we worked with other coconspirators, gave
14 shares of it to DeLeon and others of his interest. He is also
15 is a person through whom revenue flowed and then he dolled it
16 out. You will see Request No. 35 deals with the multiple
17 accounts.

18 THE COURT: Let's stick with No. 1 for a moment.

19 MR. MASTRO: I am just saying he received a lot of
20 compensation. He also received revenue that I then took in and
21 dolled out of his personal accounts for some of the we think
22 illicit payments, payments to Yanza that we think went to
23 others in Ecuador. We need to follow the money. We need to
24 follow the money that came into him. It goes to his motive and
25 interest and who else he involved in the conspiracy by who he

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1 cut in and what he did with the money that came in to him and
2 how he had it flow out from him.

3 THE COURT: The objection is overruled.

4 No. 25.

5 MR. VESELKA: I believe this was resolved by the time
6 ruling that was involved.

7 THE COURT: No. 26.

8 MR. MASTRO: Your Honor, this has to do with persons
9 who have financially supported or invested in the enterprise.
10 It goes to the operation of the enterprise, how it was funded,
11 who stands to benefit, who the coconspirators are and how the
12 enterprise functioned financially to be able to extort Chevron
13 and pay for various other schemes to extort Chevron. We use
14 specific names here of individuals involved Burford, DeLeon and
15 others. We provide information to the Court before. Part of
16 that scheme also Kohn, Amazon Watch. We were very specific
17 about.

18 THE COURT: I thought you said "included but not
19 limited to"?

20 MR. MASTRO: That's true, your Honor. So if your
21 Honor decided to limit it to these specifically named parties,
22 we would understand that. These are basically your
23 coconspirators or parties who have financially invested in or
24 benefited from the enterprise and worked in collusion with the
25 plaintiffs. So we think it is essential to prove the scheme.

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1 THE COURT: It is modified. I am striking the word
2 "person" in the second line and substituting there for the
3 words "of" and following the word of with "Burford" and the
4 rest of the names listed at the end of it. And then after the
5 phrase "criminal cases" putting in a period and striking
6 "including but not limited to."

7 MR. MASTRO: Your Honor, the next would be No. 28.

8 MR. WERDEGAR: Your Honor, can I just be briefly heard
9 on 26?

10 THE COURT: Yes.

11 MR. WERDEGAR: There is two questions. One question
12 is whether there should be discovery into the financing of the
13 litigation. The second question is even assuming the Court
14 wants to allow discovery into that and I am guessing that it
15 does from what you just said is --

16 THE COURT: Well, it goes to enterprise issue. The
17 goes to the Donziger's role in the enterprise. It goes to the
18 roles of others in the enterprise.

19 MR. WERDEGAR: The issue of all documents, and it is
20 all documents related to these individuals. It is not limited
21 to the funding or financing. And so, for example, one of the
22 individuals on this list is Donziger's brother. So he being
23 asked to produce all documents related to his brother. Another
24 individual is his brother-in-law. I am not 100 percent sure
25 which name that is. I think it might be Glen Brevlin, but I

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1 would have to confirm that, your Honor. There should be some
2 subject matter limitation beyond all documents relating to this
3 whole laundry list of organizations and individuals. Cohn,
4 Swift and Rask had a role as a funder, but they also had other
5 roles. Same with Rain Forrest Action Network. Same with all
6 these entities.

7 THE COURT: I must tell you this is not an objection
8 that is included in or statement of position here, but what
9 about it, Mr. Mastro?

10 MR. MASTRO: Your Honor, two specific individuals he
11 mentioned are funders in the litigation.

12 THE COURT: No. I took the point to be it is one
13 thing to ask for all documents relating to financial support or
14 investment or offer financial in support of litigation by A, B,
15 C and D. It is another thing to ask for all documents that
16 relate to A, B, C and D.

17 MR. WERDEGAR: Exactly, your Honor.

18 THE COURT: For example, he said a copy for his
19 brother's birth certificate is called for.

20 MR. MASTRO: I would add relating in any way to the
21 Chevron litigations. So we will have an elimination of the
22 brother's birth certificate.

23 THE COURT: So you want to say all documents related
24 to A, the Chevron litigations, and B any person?

25 MR. MASTRO: Exactly.

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1 THE COURT: Does that solve your problem?

2 MR. WERDEGAR: Yes, your Honor.

3 MR. VESELKA: It has to meet both parts.

4 THE COURT: That's right. That's right. No. 28.

5 MR. MASTRO: Your Honor, I think this is taking care
6 by the time limitation.

7 THE COURT: Yes.

8 MR. VESELKA: The time part of it has been resolved,
9 your Honor. It also goes to an issue that it is requesting all
10 documents related to these accounts which would be documents --
11 not just documents sufficient to show the payments, which
12 identify and produce any documents with regard to payments but
13 we don't think we should have to provide identifying
14 information with the bank accounts themselves.

15 MR. WERDEGAR: May I add to this? This is one that
16 there is a grouping of them. Once we resolve this one, I think
17 we'll resolve one way or another a group. We have offered to
18 produce documents to show any and all payments to Mr. Cabrera
19 and his team, the Lago Agrio court, other members of the
20 judiciary, the Republic of Ecuador, payments that relate to
21 their allegations of misconduct. The question as to these
22 requests is whether they are entitled to all documents
23 regarding these accounts such they can see all transactions
24 that took -- financial transactions that took place on the
25 plaintiff's side be it to pay something entirely innocuous, the

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1 water vendor, to pay other types of vendors or support or bills
2 that are not alleged to be improper in any way in this case and
3 do they get that full scope of financial discovery or should be
4 limited in some sense to the kinds of payments that our clients
5 are being accused of having been improper and we think it
6 should be the latter.

7 MR. MASTRO: So, your Honor, this is really the
8 question, 28, 29, 30, 33, 34 and 35, these are all the various
9 bank accounts or account information relating the heart of how
10 the scheme was carried out. This is the accounts that we
11 used -- the secret accounts to pay off Cabrera and other
12 accounts to pay off Cabrera and his team. These are from Banco
13 Pichincha. They are from Chase where Donziger maintained
14 multiple accounts and would move accounts around like a shell
15 game. They are from Selva Viva accounts, which was the front
16 organization where they funneled money through to Cabrera
17 separate from his secret accounts. The Kohn funding, which was
18 used to go into those accounts, including the secret Cabrera
19 account, and payments were made out of those.

20 Now, your Honor, when you look at the scheme to
21 suggest that they should be able to decide which of the items
22 should be revealed out of those bank accounts is like asking
23 the wolf to decide which of the hens has to be killed. The
24 fact of the matter --

25 THE COURT: Wolves usually do make that decision.

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1 MR. MASTRO: I understand, your Honor. Your Honor,
2 we're talking about a complex fraud scheme where Donziger would
3 literally get money into his Chase accounts -- he had one
4 listed as Ecuador and then he had one listed as his first bank
5 account and then his personal account and he had seven, eight
6 of these accounts and then he would funnel money. Sometimes he
7 would pay Yanza out of his personal account. Sometimes he
8 would he pay for Yanza out of the Ecuador account. Money would
9 come in and out in patterns that we could only discern when we
10 work with forensic accounts to go through those bank records,
11 the bank records for Banco Pichincha. That is where the secret
12 account was. Their words, not mine. Their secret account was
13 to pay Cabrera. Banco Pichincha was also where there was Selva
14 Viva accounts. They have the Selva Viva records. Chase is
15 where Donziger had his accounts. And then there is the Kohn
16 bank accounts where they would go for Joe Kohn and Joe Kohn was
17 clearly being directed from his office to send money to our
18 secret account.

19 So therefore you have to follow the money. That is
20 how you follow the money. They can't dictate which of those
21 payments came out. They are going to -- their clients are the
22 ones who are accused of these fraudulent transactions and these
23 crimes. We have to see the accounts to put it together.

24 THE COURT: The objection is overruled.

25 MR. MASTRO: 81P. This is all documents relating to

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1 the Cabrera or the.

2 THE COURT: 81?

3 MR. MASTRO: 81P. That is on page 15. Your Honor, I
4 think this is about the financial support for Cabrera. It was
5 being asked to financially support it. So this is a key
6 element of the Cabrera fund, the payments and the financing.

7 THE COURT: Well, I have read Mr. Donziger's position
8 here and I don't understand it.

9 MR. WERDEGAR: Well, your Honor, this was originally a
10 -- well, P was a part of a multi, multi subpart request about
11 Cabrera and the only piece of that --

12 THE COURT: Everything in this case is.

13 MR. WERDEGAR: And the only piece of that multi prong
14 request that we objected to was P, which related to basic
15 communications with funders or potential funders and it was
16 tied up with the same concern we had about their entitlement to
17 take broad ranging discovery, which has been addressed. So I
18 think this was resolved on your prior rulings, your Honor.
19 That was the basis for the objection.

20 THE COURT: Overruled.

21 (Continued on next page)

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Argument

1 THE COURT: Thank you. Overruled.

2 MR. MASTRO: Next, your Honor, I think you can take as
3 group 115, 116, 117 and 118. That's on pages 16 through 18.

4 THE COURT: The cutting up of the file.

5 MR. MASTRO: Yes. How the -- my was cut-up,
6 obviously, it goes to the operation of the enterprise motive,
7 how they were divying the pie. Also, how they are involved in
8 secreting or selling assets to further the scheme.

9 And I have to say, your Honor, on 116 goes to
10 Donziger's allegation in particular. So you know the
11 ringleader of conspiracy. And 118 goes to not simply the
12 concept of creating a trust to determine offshore trust,
13 determine how to wide the pie. It's also the documents
14 relating to the trust issue go pivotally to the ghostwriting of
15 the judgment because we have, as your Honor knows, internal
16 documents, Fajardo's e-mail where elements of that e-mail exact
17 wording from that e-mail misquoting a case misciting that case,
18 misciting other cases that have nothing to do with trust and
19 then some of the very words of his analysis showing up, all of
20 those elements showing up word-for-word in the judgment, yet no
21 where in the record anywhere, anywhere is that sequence or that
22 case cited.

23 THE COURT: What's that got to do with the trust?

24 MR. MASTRO: It has to do, your Honor, the issues
25 relating to creating a trust, the judgment creates a trust.

CCKAACHE3

Argument

1 THE COURT: Oh, I see. You are saying the piece of
2 the Fajardo document that winds up in the decision relates to a
3 trust.

4 MR. MASTRO: Correct. That e-mail is all about how a
5 trust should be created, yet it was never in the record before
6 or briefed in any way and it shows up in the judgment in all
7 those material respects and, therefore, the trust issue is sort
8 of a critical part.

9 THE COURT: I see. So, basically -- let me see if I
10 understand. I am not sure I, if ever quite understood it this
11 way before. You wind up with this 18 plus billion dollars
12 judgment in Ecuador which says more or less that apart from
13 some cut going to the lawyers, the money is to be paid into an
14 Ecuadorian trust. Is that right so far?

15 MR. MASTRO: Not even. To be set up. They --

16 THE COURT: OK. So to be paid into a trust of some
17 unknown -- and not one that exists at the time.

18 MR. MASTRO: Correct.

19 THE COURT: And you're saying that at no point up
20 until the moment this trust concept appears in the trial
21 court's decision is there a word in the evidence anywhere or in
22 the submissions to the court in Ecuador about the concept of
23 the judgment being payable in whole or in part into a trust.
24 Is that true?

25 MR. MASTRO: Before the opinion comes out creating --

CCKAACHE3

Argument

1 THE COURT: Before the opinion comes out.

2 MR. MASTRO: That's correct, your Honor. And I am
3 told that the remediation position is supposed to be in a trust
4 in Ecuador but they also talk in their documents a trust
5 outside of Ecuador.

6 THE COURT: You are telling me that there is not a
7 word about either piece, either of those trusts prior to the --
8 in the record, prior to the decision coming down. Is that what
9 you are saying?

10 MR. MASTRO: That is my understanding, your Honor.

11 MR. VESELKA: I am not in a position to agree.

12 THE COURT: Let me find out what I am being told here.

13 MR. MASTRO: That's my understanding, your Honor.

14 THE COURT: And then we have this Fajardo document
15 talking about a trust shot through with misquotations and
16 errors, you say.

17 MR. MASTRO: Yes, your Honor.

18 THE COURT: And then lo and behold, from the forehead
19 of Zeus in the decision by the Ecuadorian judge, all of a
20 sudden this concept of a trust to receive the proceeds appears
21 and it is, at least in part in -- along with all the errors
22 from the Fajardo document that was never in the record.

23 MR. MASTRO: That's what I'm saying.

24 THE COURT: Now I understand. All right. Folks, now
25 I understand why he wants this. What have you got to say?

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Argument

1 MR. WERDEGAR: First all, your Honor, I am not in a
2 position to agree with or expressly disagree with anything he
3 said. This is a new theory that wasn't something that we had
4 back and forth about. This wasn't included in their so-called
5 ghostwriting thing, so I want to check on --

6 THE COURT: Oh, no. It was -- I know that there was
7 earlier on in conjunction with the motion for summary judgment
8 a discussion about this Fajardo document and the fact that
9 pieces of it suddenly appeared, though the Fajardo document
10 never had been in the record in the judge's opinion. I think I
11 remembered that accurately.

12 MR. WERDEGAR: You are correct about that, your Honor.
13 But as to a basis to seek financial information about how
14 the -- what I understand they're interested in is how the money
15 that is to be paid to the lawyers is to be divided up, that
16 piece of the analysis is new.

17 THE COURT: Well, but he -- all right. Stay with me
18 because I am trying to get my arms around it. 118 is asking
19 for documents concerning the concept of necessity or
20 desirability or the creation of any trust to hold the proceeds.
21 Including, but not limited to documents concerning the judgment
22 trust discussed in the court decision and communications with
23 the Court in Ecuador concerning the trust.

24 Now what he's getting at very directly here is
25 ghostwriting. He is getting at the theory that this bright

CCKAACHE3

Argument

1 idea of a trust to hold the proceeds of judgment is a creation
2 of the plaintiffs, the Ecuadorian plaintiffs, and that it is
3 slipped, secretly, to the judge down there and that he buys it
4 is hook, line and sinker and typographical errors and sticks it
5 in the judgment. And I take it, Mr. Mastro, you're suggesting
6 also that you anticipate that there are other documents which
7 will show the motives for the trust, particularly, the offshore
8 part of it, right?

9 MR. MASTRO: Correct, your Honor.

10 THE COURT: And am I correct in remembering that
11 there's been something in the record in this case about
12 limitations on either the amount or the nature of legal fees
13 payable in Ecuador and a desire to keep judgment proceeds
14 offshore so that the lawyers can cut up the pie in a way that
15 would not be permissible if the money ever reached Ecuador, am
16 I --

17 MR. MASTRO: Yes, your Honor. It's actually in the
18 Invictus memo. It's proposed that such an offshore trust be
19 set-up so that the funds can be divided in a way outside of the
20 government of Ecuador and Ecuadorian law.

21 THE COURT: See, I remember all that and you know this
22 case a whole lot better than I do, Mr. Werdegar. Am I off
23 base? It seems to me it makes sense.

24 MR. VESELKA: If I may, your Honor. To the extent any
25 of this as it pertains to the ghostwriting, it's applicable --

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Argument

1 vis-a-vis ghostwriting. I think that's been resolved on other
2 issues.

3 THE COURT: If and to the extent that's true then it's
4 nothing to worry about.

5 MR. VESELKA: That would be the description of that
6 document and I don't remember whether the issue of trust
7 generically came up before that or not. I just don't remember.
8 But the question here is also going to the account -- to the
9 extent it goes to the other items of analysis of the benefits
10 of a trust, what kind of trust, this or that or the other that
11 don't go to the documents that pertain to ghostwriting. The
12 only one that would pertain to ghostwriting is the one that
13 they've pointed out that's in there.

14 The other considerations such as the Invictus memo
15 thinking about trust is the way to preserve the funds or
16 remediation or some other things that were kicked around would
17 not be necessarily ghostwriting. So as to -- there's some part
18 of this that wouldn't go to ghostwriting then the question is
19 what's relevance and is all of that properly relevant and/or is
20 it overly broad?

21 THE COURT: You want to respond to that, Mr. Mastro?

22 MR. MASTRO: Well, your Honor, I am just trying to
23 make sure that I have confirmed exactly the facts.

24 What I could tell your Honor is that the contents of
25 the Fajardo, the content of a trust is something that may have

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Argument

1 been mentioned in the record but the content of the Fajardo
2 e-mail, the way he describes setting up the trust, the case he
3 cites at all is not anywhere in the record. The content of the
4 Fajardo e-mail and the way he describes the trust issue,
5 quoting that case, citing that case and citing other cases is
6 no where in the record anywhere and we have confirmation from a
7 complete review of the record. And then what shows up in the
8 judgment itself is not merely a reference to a trust. It is --

9 THE COURT: No. That's the whole thing with --

10 MR. MASTRO: Citing the case, the wrong citation, the
11 other cases they don't and quoting from the Fajardo e-mail
12 itself. So I don't want your Honor to think there is no
13 reference in the trust.

14 THE COURT: All right. I appreciate the correction.
15 So let's come back to the nub of the issue.

16 Counsel behind you are saying that the consequence of
17 what they've agreed to and the rulings I've made, you are
18 getting everything relating to the ghostwriting of the decision
19 shorthand but we all know what we're talking about which would
20 include the part of the decision relating to a trust.

21 Now, this request is a little bit broader than that.

22 MR. MASTRO: Correct, your Honor.

23 THE COURT: This request is going to documents they
24 may have including documents that may never have been given to
25 the judge about this idea of, well, maybe we should have a

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Argument

1 trust or something like that.

2 Now, what's your argument as to relevance of that
3 above and beyond the ghostwriting stuff?

4 MR. MASTRO: Because this is part of the operation of
5 the scheme, your Honor. We expect there to be documentation
6 relating to the trust about how they're going to divvy up the
7 money, who is going to get money out of the trust, how it's
8 going to be dispensed and operated, where it's going to be set
9 up. This is in the nature of how they're allocating the
10 judgment. This is an essential piece. Let's set up the trust,
11 then we'll be able to control how we give divvy the money to
12 ourselves and those we want to give money to. So it's equally
13 relevant on those issues about operation of the enterprise,
14 motive, etc.

15 MR. WERDEGAR: Your Honor, again, we've agreed to
16 produce the executed funding agreements which are going to
17 provide them with information about who is entitled to a piece
18 of it, provide them but the idea that -- nothing I've heard
19 Mr. Mastro as saying justifies getting into all aspects of how
20 the litigation is financed and how the money is going to be
21 allocated. If with the executed financing agreements is going
22 to cover that and it's very intrusive discuss discovery that is
23 going to involve a lot of logging. It's irrelevant.

24 THE COURT: The point that keeps occurring to me is
25 this. My recollection and Mr. Mastro more or less confirmed it

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Argument

1 and nobody disputed it, is that the judgment provides for a
2 trust to receive proceeds and the trust either is to be --
3 provides for more than one trust and at least one of the trusts
4 either is required to be or may be offshore to Ecuador. You
5 all agree on that?

6 MR. VESELKA: Off the top of my head one is just not
7 specified. One at least in one part of the -- I thought it was
8 said to be an Ecuadorian trust.

9 THE COURT: OK. Well, now, so it's not specified.
10 And given the fact that somebody went to the trouble of
11 specifying that one was to be Ecuadorian and distinguishing the
12 other is at least consistent with the view that there was a
13 fair probability it would be offshore, reasonable inference?

14 MR. VESELKA: I'm not sure only because I can't
15 remember if the nature of the second one came out of the
16 appellate decision which is where I had some memory that the
17 second trust came out of appellate decision. Or maybe it was
18 more just the who was going to set it up or I may be confusing,
19 greater detail that came out of the appellate decision rather
20 than the trial decision.

21 THE COURT: Well --

22 MR. VESELKA: It was one of a series of possible
23 inferences.

24 THE COURT: Divvy. OK. And am I right in thinking
25 that if all the money went into Ecuador what the lawyers might

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Argument

1 take out of this would be very different assuming Ecuadorian
2 law applied than if a bunch of the money went into a trust
3 outside of Ecuador?

4 MR. VESELKA: There are documents in the case that
5 reflect legal questions as to -- that there may be some effect
6 of that. I am not saying I know what the effect would be.
7 There are, certainly, documents that have been discovered and
8 produced where that issue raised would it have some impact?
9 Divvy, your Honor.

10 THE COURT: OK. And in a case in which Mr. Donziger
11 and Mr. Fajardo are both the defendants and in which other
12 lawyers are named as co-conspirators, though not defendants,
13 why wouldn't it be extremely relevant to know whether and how
14 they developed a strategy to keep a lot of the money outside of
15 Ecuador in order to help themselves to big parts of it that
16 they couldn't get in if it wound up in Ecuador all the while
17 wrapping themselves in the Ecuadorian flag and the interests of
18 the poor -- people of the Rainforest.

19 Now, I don't mean to put down or to be derogatory in
20 any way toward the people in the rainforest or to be in any way
21 disrespectful. I am not.

22 MR. VESELKA: Thank you for that, your Honor.

23 THE COURT: I am just --

24 MR. VESELKA: I apologize for interrupting.

25 THE COURT: Thank you.

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Argument

1 The fact is there's a whole lot of rhetoric in this
2 case. It has been for decades. And here you have the people
3 who are perpetrating the rhetoric or using the rhetoric. And
4 the theory is well, gee, they really were trying to structure
5 this in a way to enrich themselves at the expense to people
6 they were supposedly representing. And not only that -- and I
7 am not endorsing this as a matter of fact yet. I don't have
8 enough evidence. But there's some evidence in what I take to
9 be the plaintiff's theory. And not only that, they're slipping
10 language to the judge. At least that's the hypothesis, haven't
11 proven yet, to effectuate this result. Seems kind of relevant,
12 doesn't it? I mean at least to the point that maybe they're
13 entitled to take a look at it and see whether it's exactly what
14 happened or totally baseless.

15 MR. VESELKA: I believe that the evidence as to
16 whatever the lawyers are going to get having any interest,
17 regardless, of how hard or less hard it would be to get it goes
18 to motive. They can be shown to have motive. So the Court has
19 raised motive as a basis for discovery so far today. Rather,
20 there's more or less of it there vis-a-vis their clients that
21 would not be vis-a-vis Chevron and it would not be -- This is
22 not a case about neither defrauding the funders or defrauding
23 the client.

24 THE COURT: So just assume hypothetically that there
25 were evidence at trial in a case involving whether they

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Argument

1 defrauded the Court or were in collusion with the Court
2 effectively to defraud Chevron that at the same time they were
3 doing that they were effectively defrauding the clients or
4 breaching duties owed to the clients to put it in what might
5 even be more accurate terms. But, nonetheless, don't you think
6 the second is relevant to whether the first happened?

7 MR. VESELKA: I don't see where that's automatically
8 so, no.

9 THE COURT: I didn't say "automatically". I mean, if
10 they were doing this to their clients doesn't it make it
11 somewhat more probable that they were engaged in something
12 deceitful vis-a-vis the Court and Chevron under 404(b) is
13 doesn't it clearly come in in a criminal case?

14 MR. VESELKA: If it's in a criminal case, obviously.

15 THE COURT: Doesn't matter the rules same in and
16 indeed it's more permissive, as I remember.

17 MR. VESELKA: And I won't digress. We all agree that
18 that's the way the law is supposed to be how in practice
19 between criminal cases and civil cases. It is doesn't always
20 work out that way.

21 THE COURT: I'll tell you in a case about money rather
22 than somebody's life or liberty, I think I'd be a little bit
23 more restrictive in the case involving life or liberty.

24 MR. VESELKA: And I understand that. My problem is
25 having been around in certain courts, not in New York, in

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Argument

1 Washington, some courts in regard to criminal cases it
2 sometimes becomes much less restrictive there than I can
3 sometimes bring in civil cases in times as a plaintiff's civil
4 lawyer than a civil lawyer. But I don't want to take that much
5 time on that, your Honor. But I don't think that how they
6 relate to their other counsel or the funders or their client is
7 that relevant. Potentially probative of a how they're
8 defrauding Chevron in light of the burden that is due because
9 it's going to involve so many other documents of drafts or
10 consideration beyond just the operative documents which all the
11 parties agree they should get.

12 THE COURT: Yeah, but I think you've gotten off the
13 subject of Request 118 and onto a somewhat different subject.

14 Overruled as to 118. Now, anything else on?

15 MR. MASTRO: Last one, your Honor, is 150.

16 THE COURT: 105?

17 MR. MASTRO: Divvy. It is related to some of the
18 earlier requests, documents relating to Selva Viva and that's
19 the organization through which they would funnel resources,
20 make payments that were ordered by the Court to Cabrera and
21 conduct many of their activities through that front in Ecuador
22 that we say are part and parcel of the fraudulent scheme there.

23 THE COURT: Isn't this redundant at this point?

24 MR. MASTRO: Sorry, your Honor?

25 THE COURT: Isn't it redundant of other requests?

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Argument

1 MR. MASTRO: There's definitely overlap of other
2 requests.

3 THE COURT: So what, if any, area is not overlapping,
4 please?

5 MR. MASTRO: Well, this would be broader than just the
6 funding in solicitation documents. It would be other documents
7 related to Selva Viva as well but if your Honor wanted to limit
8 it, I understand.

9 MR. VESELKA: I don't see how it could be any broader
10 than Donziger 25 all agreements relating to --

11 THE COURT: One is agreements. One is documents
12 related to.

13 MR. MASTRO: It's really all documents related to
14 Selva Viva including the funding and solicitation documents
15 which your Honor had already ruled on. So we understand if
16 your Honor thinks this would be redundant or too broad beyond
17 the funding and solicitation documents which is the principal
18 reason for wanting to have them.

19 THE COURT: Sustained. OK. I think that takes us to
20 B4.

21 MR. MASTRO: Yes, your Honor. These are two related
22 requests, your Honor. These are on pages 20 to 22. 119
23 involves communications with foreign governments in connection
24 with any -- to enforce the Lago Agrio judgment and I think your
25 Honor previously ruled in the context of the scope or timeframe

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Argument

1 scope that that would be limited to Canada, Argentina and
2 Brazil. So with that limitation, we ask your Honor to require
3 production. We asked for broader but we understand your
4 Honor's ruling.

5 THE COURT: As limited any problems, gentlemen, beyond
6 what we've already dealt with?

7 MR. WERDEGAR: Your Honor, my only hesitation is and I
8 just this is purely hypothetical I must admit but I don't know
9 if there have been communications that by the rules or the
10 nature of the proceedings any one of these jurisdictions are
11 meant to be confidential communication. I just don't know.
12 And so if there was an obligation to keep something
13 confidential there I don't know how that would interface with
14 your Honor's ruling here.

15 THE COURT: Well, I'll worry about that if it happens.

16 But let me ask you this, Mr. Mastro. Every single
17 court file in these three other countries are communications
18 with foreign governments, aren't they?

19 MR. MASTRO: Your Honor, we're not asking for official
20 court filings that we have notice of. We're asking for other
21 forms of communication. It's the same issue, red herring issue
22 that they raised before.

23 THE COURT: Well, they didn't raise it. I raised it.

24 MR. MASTRO: I understand, your Honor.

25 THE COURT: Not trying to get in the spirit of fishing

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Argument

1 expedition.

2 MR. MASTRO: We're not asking for that, your Honor.

3 THE COURT: OK. So it excludes court filings, public
4 court filings, right, satisfactory?

5 MR. MASTRO: Yes, your Honor.

6 THE COURT: OK.

7 MR. MASTRO: The second request here, your Honor, has
8 to deal with documents relating to the Invictus memo and
9 communication to third parties regarding the Invictus memo
10 because that was used to shop around for financiers and
11 investors like Burford and others.

12 THE COURT: I am inclined to sustain this objection.
13 Why shouldn't I?

14 MR. MASTRO: Well, your Honor, I think for the
15 fundamental reason that the Invictus memo lays out key elements
16 of the extortion scheme and how they LAPS intends to use the
17 judgment in furtherance of extortion. Then we know that they
18 actually used it to try to solicit others to join the
19 conspiracy to invest in it.

20 THE COURT: I see your point. so your point is really
21 not with respect to "A" but with respect to "B".

22 MR. MASTRO: Correct, your Honor.

23 THE COURT: In other words, you're saying that far
24 from being some think piece like law firms do all the time,
25 this was not some summer associate off in a library filling his

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Argument

1 time with useless occupation. This was, in fact, a key part of
2 the scheme. And moreover, they were selling interest in the
3 lawsuit on the theory that the odds are that they could create
4 so much trouble for Chevron by forcing it to litigate
5 simultaneously all over the word that sooner or later Chevron
6 would buy piece without regard to the merits of the underlying
7 situation.

8 MR. MASTRO: Correct, your Honor. And we know they
9 shopped to Burford and others.

10 THE COURT: Gentlemen?

11 MR. WERDEGAR: Your Honor, with respect to "B" to the
12 extent that the Invictus memo was sent to a third party, that
13 was not part of a privileged communication. I think we would
14 agree to produce that and then I guess if it's a matter of
15 communications that are this memo was being passed from one law
16 firm to another or from a law firm from someone within a common
17 interest or the like and I think that potentially even sharing
18 it with investors there's case law regarding that, that that
19 would be a protected communication but beyond privilege.

20 THE COURT: We'll see whether it is or not but I do
21 remember once at least three maybe four decades ago having
22 somebody explain to me, a layperson I must confess, that there
23 was really no difficulty fixing prices in the United States as
24 long as the lawyer for Company A called the lawyer for Company
25 B, no problem. Privileged. So it's not always that simple.

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Argument

1 MR. WERDEGAR: Understood, your Honor, and I didn't
2 mean to imply that it was. But I think that if the focus here
3 is on "B" and it's subject to our searches what we believe to
4 be genuine claims of privilege, I think that universe of
5 communication could be very small in any event. Well, I
6 thought that too. So the objection is sustained as to Part A
7 and overruled as to Part B.

8 OK. We're done with B4 I think. Right?

9 MR. MASTRO: Yes, your Honor.

10 THE COURT: Moving right along. B5.

11 MR. MASTRO: B5 three requests, your Honor, related to
12 the Pressure Campaign, 131, 139 and 140. I can go through them
13 quickly. They all relate to aspects of the Pressure Campaign
14 to try and put pressure on Chevron to settle. The first
15 request, 131, deals with the use of NGOs like Amazon Watch and
16 others.

17 Your Honor, I think we have addressed the defendants'
18 issue here. We provided them yesterday with a list of NGOs
19 consistent with what we did at your Honor's direction with
20 Patton Boggs. So they have a list of specific group of NGOs
21 who are covered and their NGOs who have relationship with the
22 defendants. So, that's an essential part of their pressure
23 campaign to use the supposedly not-for-profit groups that they
24 were in some cases funding.

25 THE COURT: OK. So, we've dealt with the time period

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Argument

1 already. You've got a list instead of an open-ended question.
2 Donziger previously had agreed to produce subject, to produce
3 this material subject to the time period issue. What's left?

4 MR. WERDEGAR: Your Honor, I think the issue is very
5 narrow one at this point and it's really our view is these are
6 all phrased again as these all documents related to and
7 related, of course, being any possible connection. We've tried
8 to negotiate to have this be the communication that they're
9 talking about and documents discussing those communications to
10 try and at least somehow narrow the realm of this. So it's not
11 including every possible internal document or e-mail related
12 again to those organizations what's related to as defined as
13 broadly as you can imagine.

14 MR. MASTRO: Actually, it's relating to, regarding
15 Chevron or the Chevron litigation. So it's already been built
16 into the requirement.

17 THE COURT: Isn't the phone bill that reflects a call
18 in which such a communication took place a document related to
19 such a communication?

20 MR. MASTRO: Exactly, your Honor.

21 MR. WERDEGAR: Well, your Honor, that's a fair point
22 that we're, obviously, not looking just for that.

23 THE COURT: So fix this.

24 MR. MASTRO: OK. We should be able to fix it just
25 fine.

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Argument

1 MR. VESELKA: Our suggestion was that it be
2 communications or documents discussing communications is what
3 we had suggested is reflected on here, your Honor.

4 (Pause)

5 MR. MASTRO: We should be able to work that out. I
6 just wanted to point out that this is about communications with
7 NGOs and also their own documents about affecting their
8 Pressure Campaign strategies through the use of NGOs. So it
9 covers both communications with NGOs and Pressure Campaign to
10 use NGOs.

11 THE COURT: Well, I am reasonably confident that you
12 can work out some language on this.

13 MR. MASTRO: Understood, your Honor.

14 Your Honor, 139, again, part of the Pressure Campaign
15 are documents related to contemplated rational communications
16 with Chevron expert witnesses. Now this is a pretty limited to
17 universe, your Honor. Since they wouldn't ordinarily be
18 communicating with our expert witnesses but in this
19 extraordinary case there are actually lawyers for the
20 plaintiff's side who wrote threatening letters to our experts
21 and they've used that as part and put them out publicly to try
22 to create pressure on Chevron and on those experts. I am
23 talking, specifically, your Honor, about Mr. Page who worked
24 with Mr. Donziger as a lawyer, an associate of Mr. Donziger's,
25 writing letters to three Chevron experts, Macky, Henshy and

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Argument

1 Alvarez and copying their academic deans to try and create a
2 scandal. And there may be other instances. I think they would
3 be very limited but highly probative, not only the question of
4 Pressure Campaign but also the question of witness intimidation
5 and tampering.

6 MR. VESELKA: We've not objected, provided any
7 documents that are communications directly with any of their
8 experts. It's the fact of the breadth of going to relate to
9 contemplated or actual. So any document about contemplating
10 about -- when there was none, we think is overbroad. And any
11 document, for example, that Mr. Page sent this letter, so I am
12 supposed to produce back to them Mr. Mastro's letter to me
13 accusing me of engaging in unprofessional conduct because of
14 Mr. Page's having done that, then our letter responding back to
15 him on that. I think that's far afield.

16 THE COURT: Well, I am sure Mr. Mastro is not looking
17 for that and would readily agree to exclude from the scope of
18 this request communications between Chevron as lawyers on one
19 hand and the Ecuadorian plaintiffs or Mr. Donziger and their
20 lawyers on the other. That's not what they're talking about.
21 And I am sure he'll give it to you in writing, right,
22 Mr. Mastro?

23 MR. MASTRO: That's correct, your Honor.

24 THE COURT: OK. So I read the business with Mr. Page.
25 And I think, particularly, in light of the business with

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Argument

1 Mr. Page and also the business, the testimony of Charles
2 Kambacker they're going to get this and I think everybody ought
3 to be extremely sensitive to the witness tampering issue, if
4 you get my drift.

5 MR. VESELKA: We always are.

6 MR. MASTRO: Your Honor, the last of these on the
7 Pressure Campaign are documents relating to submissions to
8 various international agencies including the American
9 Commission on Human Rights. Part of the scheme has been to try
10 and generate pressure on Chevron through getting these
11 intergovernmental organizations to feeding them false
12 information and trying to get them to say something on the
13 issue to embarrass Chevron. So this is one where --

14 THE COURT: Isn't this a case where at least for
15 starters it would not -- it would suffice to get the
16 communications first if there are any and then if there's some
17 reason to go further, go further?

18 MR. VESELKA: That's what we had offered.

19 MR. MASTRO: Your Honor, we're willing to do that and
20 on the basis that if we feel there's a basis there to find out
21 more, we'll come back to your Honor.

22 THE COURT: Right. And I understand a trust from
23 defendants that if after getting what they're offering you feel
24 you want to go back and get communications relating to the
25 communications or documents relating to the communications,

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Argument

1 we're not going to have an argument that the last date we're
2 asking for documents with December 1st on that one point alone.

3 MR. WERDEGAR: Understood, your Honor.

4 MR. VESELKA: That's consistent with an agreement
5 we've already worked out as to the whole bunch of our documents
6 we'll present to you as you asked to give you the agreements.
7 We've already work out that process is what we -- now.

8 THE COURT: OK.

9 MR. MASTRO: Your Honor, actually, Donziger's counsel
10 had agreed to produce documents of that request. It was just a
11 LAPS.

12 THE COURT: He probably doesn't have any. I am being
13 facetious.

14 MR. MASTRO: We only have one more, your Honor.

15 THE COURT: I thought we were done.

16 MR. MASTRO: So close. B7 it really is just --

17 THE COURT: B7?

18 MR. MASTRO: It relates to obstruction and witness
19 tampering and it's point "H" that appears in request 158
20 through 61. Again, it has to do again with Mr. Page and we
21 want documents relating to communications with him concerning
22 his deposition and production of documents in the 1782 action.
23 In light of the role that he played in pressuring Chevron
24 expert witnesses and he's represented by LAPS counsel at that
25 1782 proceeding. And we would like to get those documents as

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Argument

1 well that go to the heart of his collusion with the LAPS in
2 Donziger and what they've done to sort of obstruct the
3 discovery there and here.

4 MR. WERDEGAR: Your Honor, we've use the word "fishing
5 expedition" a few times today but this truly is getting pretty
6 far afield and Chevron has had every opportunity. The 1782
7 proceeding is ongoing. If they have concerns they can bring up
8 in that proceeding with the judge who is presiding over the
9 discovery from Mr. Page in connection with this proceeding.

10 THE COURT: I thought that matter was concluded.

11 MR. MASTRO: Actually, what happened, your Honor, was
12 there was a production that Mr. Page and we think it will be
13 illuminating to see the communications with defendants' counsel
14 arrange a clawback because Count Nine was dismissed. So we are
15 still litigating there. He's actual actually effected the
16 obstruction his materials would be used out of that proceeding.
17 And he's the one whose been sending these missives to our own
18 witnesses that intending to intimidate them. So we really want
19 to find out how it came about Page was working with the LAPS
20 counsel as his own counsel has affected obstruction there.

21 MR. WERDEGAR: Your Honor, to call this obstruction
22 he's been litigating an issue in the District of Maryland. Mr.
23 Page and his counsel won on appeal before the D.C. Circuit. To
24 say is a winning on appeal is somehow obstruction of justice if
25 really unfair. In any event, it's an ongoing proceeding. They

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Argument

1 can take this up with the judge down there. This seems like
2 it's trying to turn the defense of this case into another
3 subject for discovery. It is snowballing on its own.

4 MR. MASTRO: They actually didn't win a D.C. appeal.
5 Your Honor, it was because Count Nine was dismissed.

6 THE COURT: The last time I checked appeals from
7 Maryland went to the Fourth Circuit.

8 MR. MASTRO: Correct, your Honor.

9 They agreed to this on every other witness, your
10 Honor, except Mr. Page because Mr. Page has played a unique
11 henchman role here. That's why they don't want to give as to
12 Page when they have been willing to give as to every other
13 witness.

14 THE COURT: The objection is overruled. OK. That
15 takes care of this.

16 Now, have you a whole, not a big number but a number
17 of points to come back to me on. One is Request 83. With
18 respect to the time period, you are going to look at carve-outs
19 for items discussed on the record. With respect to the 98 and
20 108 there's an open issue on 121 according to my notes. You
21 are going to exclude public filings on 119. It's limitation
22 according to my notes on 131 and 139 and 140 was going to be
23 modified. That's my list.

24 Does anybody have a different list?

25 MR. MASTRO: No. That is my list, your Honor and

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Argument

1 there's really only one other outstanding issue in this regard
2 I think for today's purposes in terms of our motions to compel.

3 THE COURT: What's that?

4 MR. MASTRO: That is the continuing position of the
5 defendants that they don't intend to produce documents from
6 their co-counsel and agents in Ecuador.

7 THE COURT: I understand that point. I'll issue a
8 decision on that.

9 MR. MASTRO: Thank you, your Honor.

10 THE COURT: OK.

11 MR. VESELKA: I apologize, your Honor. I am just not
12 as -- can you give me that? I'll be able to get it off --

13 THE COURT: Yeah, Mr. Mastro has it.

14 So I would like to have when we meet tomorrow a
15 supplement to your joint report making all the appropriate
16 modifications. And to the extent you are still in
17 disagreement, I hope there aren't any but any disagreements on
18 these open issues from today and we'll get that all wrapped up.

19 Now, if I'm not mistaken, we are now at a point where
20 all outstanding objections, save privilege, have been resolved
21 to the document requests to the non Stratus defendants. Is
22 that correct?

23 MR. MASTRO: Divvy, your Honor.

24 MR. VESELKA: So those that were served before
25 November 29th and I can't --

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Argument

1 THE COURT: Well, the ones --

2 MR. VESELKA: The ones that you set for a hearing
3 today.

4 THE COURT: Yeah, the ones affected by motion to
5 compel number 608 on the docket.

6 MR. VESELKA: Yes, your Honor.

7 THE COURT: OK. Therefore, the time has come to start
8 gathering the documents, folks. I understand we're going to
9 have a privilege log time has come to start preparing the
10 privilege log and --

11 MR. VESELKA: I apologize, your Honor. The parties
12 have worked out how they propose timing and potential protocol
13 that we'd like to present with regard to the privilege log that
14 we need to try to finalize and present.

15 THE COURT: All right. Well, are you going to be in a
16 position to do that tomorrow?

17 MR. VESELKA: That was what our objectives were that
18 we sort of got sidetracked yesterday and prepared for these
19 things to deal with the Court's ruling and as I've described
20 them so.

21 THE COURT: Well, let's see if we can do it any way.
22 You know if you can't, you can't. But I would much prefer and
23 I do not intend to lose entirely the next couple of weeks,
24 notwithstanding, the holidays. I mean I understand everybody
25 wants to take some time and relax over the holidays and I am

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Argument

1 all for it but this going to have to move forward and I will
2 have that in mind when I talk about the schedule. This has
3 been dragging long enough and I set a schedule that I thought
4 was realistic and it is still my intention to meet it.

5 OK. See you in the morning, 9:30.

6 (Adjourned to Friday, December 21, 201 at 9:30 a.m.)
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